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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1438

CROWN CENTRAL PETROLEUM CORPORATION, *Petitioner,*

vs

MYRTLE LUCILLE GOODMAN TREXLER, Administratrix of the Estate of ROBERT W. TREXLER, Deceased,
BARGE NO. 104, in rem,
L & L TOWING COPORATION,
SOUTHERN TRANSPORTATION CO., INC.,
Tug RAVEN, in rem,
VERMILLION TOWING CORPORATION,
RICHARD S. SMITH,
WILLIAM E. LAW,
ROBERT R. VERMILLION,
WILLIAM W. MARSHALL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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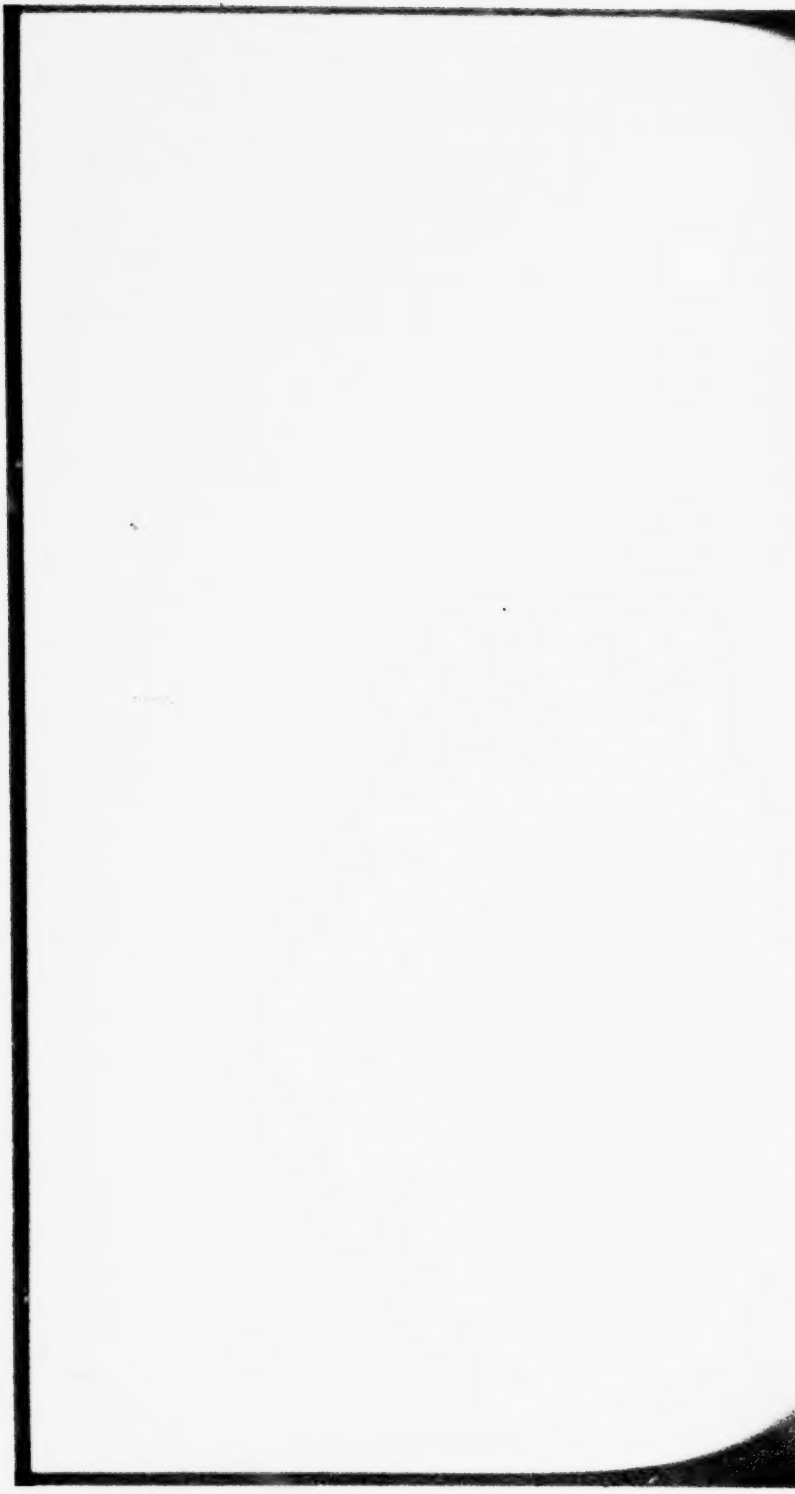

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Supreme Court of the United States

OCTOBER TERM, 1969

No.

CROWN CENTRAL PETROLEUM CORPORATION,

Petitioner,

vs

MYRTLE LUCILLE GOODMAN TREXLER, Administratrix of the Estate of ROBERT W. TREXLER, Deceased,
BARGE NO. 104, in rem,
L & L TOWING COPORATION,
SOUTHERN TRANSPORTATION CO., INC.,
Tug RAVEN, in rem,
VERMILLION TOWING CORPORATION,
RICHARD S. SMITH,
WILLIAM E. LAW,
ROBERT R. VERMILLION,
WILLIAM W. MARSHALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Crown Central Petroleum Corporation respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in these matters on January 22, 1970.

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OPINIONS OF THE COURTS BELOW

The Opinion of the District Court for the Eastern District of Virginia, (Walter E. Hoffman, Chief Judge), rendered on September 12, 1968, is reported at 290 F. Supp. 429 and is printed as Appendix A, infra. pp. 1a-42a.

The original opinion of the Court of Appeals for the Fourth Circuit, rendered on October 31, 1969, is not reported.

Upon Petition for Re-Hearing, denied by Order of January 22, 1970, (Appendix C, infra. pp. 49a-51a) the Fourth Circuit withdrew portions of its original opinion and substituted extensive modifications.

The modified opinion of the Fourth Circuit is reported at 419 F.2d 536 and is printed as Appendix D, infra. pp. 52a-78a, the "modified" portion being appropriately indicated. The portion "withdrawn" is printed as Appendix E, infra. pp. 79a-80a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1970, Appendix C, infra. pp. 49a-51a. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Where one plaintiff involved in several multiple-party suits that were consolidated for trial obtains judgment against only one co-defendant with a second co-defendant being absolved and dismissed from liability, fails to appeal from the District Court's judgment, does a Court of Appeals, upon the appeal of the first co-

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defendant and after reversing the judgment against the first co-defendant, have or acquire jurisdiction and power to grant the plaintiff judgment against the second co-defendant who was dismissed by final judgment in the District Court from which the plaintiff had not appealed?

STATUTE INVOLVED

The statute involved herein is the Time For Appeal provision, 28 U.S.C.A. §2107 of Chapter 133, United States Code, printed as Appendix F, infra. pp. 81a.

STATEMENT OF THE CASE

The undisputed facts as related by both the trial and appellate court disclose that the unmanned Tank Barge 104, (in tow of the Tug RAVEN), laden with 179,181 gallons of gasoline, arrived at Crown Central Petroleum Corporation's Richmond, Virginia, terminal shortly before Midnight, July 4, 1961. Discharge pumping from the Barge, under supervision of Smith, a licensed Tankerman and also the Tug's Mate, commenced between 12:15-12:30 a.m., July 5th, with delivery into Crown's shore-tank under supervision of Assistant Terminal Superintendent Chadwick.

Between 1:15-1:30 a.m. and shortly after Terminal Night Watchman Price had completed his 1:00 a.m. inspection, a fire engulfed and destroyed the barge, tug, portions of the terminal and adjoining real estate. Robert Trexler, a tug crewman, was fatally burned.

In the many ensuing multiple-party suits which were consolidated for purposes of trial, the District Court, sitting in admiralty, determined the *cause* of the fire by first determining (1) the place where the fire originally broke out and (2) the cause of ignition.

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In its opinion the District Court reviewed extensive ore tenus testimony, corroborating physical facts, expressly rejected the ore tenus testimony of Tankerman Smith as being uncredible and made the factual findings that the fire originated in the Barge's No. 4 starboard tank opening or dome and was ignited by Tankerman Smith's admitted use of an unapproved metal flashlight while inspecting that tank. The District Court absolved Crown from any liability, granted Trexler's Estate final judgment for a Jones Act death recovery of $96,388.59 against decedent's employer (Barge-owner) and provided for a reference to determine Crown's (and other claimants') damages. (District Court Judgment, Appendix B, infra. pp. 43a-48a).

Although the Barge and Tug owners appealed from the District Court's judgment against them, Trexler's Estate neither appealed nor cross-appealed from the District Court's final judgment absolving Crown of any liability and dismissing Crown from further proceedings. Thus in the Appellate Court below Trexler's Estate was an appellee to the Barge and Tug owners' appeal but otherwise was a non-appealing suitor in this multiple-party litigation. Nevertheless, in its brief as an appellee and at the time of oral argument, Trexler's Estate urged that in the event the Circuit Court of Appeals should reverse the District Court's Jones Act judgment against Trexler's employer, then Crown should be ordered to pay that judgment (Appendix G, infra. pp. 82a).

In its opinion the Court of Appeals accepts Smith's testimony, makes entirely different factual findings, inferences and legal conclusions and holds that notwithstanding Tankerman Smith's own contradictions, all the other conflicting ore tenus testimony and corroborating physical facts, the District Court was "clearly erroneous" in rejecting Smith's testimony. Thus the Court of Ap-

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peals originally granted Trexler Estate's request and ordered that a $96,388.59 Jones Act judgment in favor of Trexler's Estate should be entered against Crown Central Petroleum Corporation (Appendix E, infra. pp. 79a-80a).

The Court below subsequently denied Crown's Petition for Re-Hearing but by Order (Appendix C, infra. pp. 49a-51a) withdrew portions of its original opinion and substituted modifications thereof. The Appellate Court thus acknowledged it could not impose a Jones Act recovery against Crown because there had been no employer-employee relationship, but notwithstanding the Estate's failure to appeal, it did grant Trexler's Estate a $30,000.00 Virginia Death Act judgment.

The Court below dismissed all statutory appellate requirements and decisions of this Court and other Circuits as being merely "a rule of practice" which it could disregard.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Court of Appeals' Decision Below Is In Conflict With The Supreme Court's Decision In MORLEY CONSTRUCTION CO. v. MARYLAND CASUALTY CO., 300 U.S. 185 Which Established And Defined The Power Of An Apellate Court To Modify A Decree For The Benefit Of A Non-Appealing Suitor.

The crucial point here is whether a litigant who fails to take a separate or cross-appeal from an adverse final judgment entered in favor of one co-defendant, may, upon an appellate court's reversal of the trial court's factual findings and judgment against the second defendant, request and obtain judgment against the first co-

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defendant for whom final judgment had been entered in the trial court.

The point was met and directly answered in *Morley Construction Co. et al* v. *Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937) in which this Court ruled that a Court of Appeals may not revise factual findings in favor of a non-appealing party if a revision of the District Court's judgment is incident to that factual revision. This Court said:

300 U.S. 185 at 191-192:

> "Without a cross-appeal, an appellee may "urge" in support of a decree any matter appearing in the record, . . . What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . . The rule is inveterate and certain. . . . Findings may be revised at the instance of an appellant, if they are against the weight of the evidence, . . . This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. . . . "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, . . ."

The general rule that a separate or cross-appeal is necessary to enable an appellate court to revise factual findings in favor of an appellee is specifically followed in admiralty. *The MARIA MARTIN*, 12 Wall. 31, 20 L.Ed. 251, cited with approval in *Morley Construction Co.* (supra).

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In this case, Trexler's Estate did not appeal from the District Court's final judgment entered on October 23, 1968, absolving Crown from any liability. The Barge and Tug owners did appeal and thus Trexler's Estate became a non-appealing suitor.

In its brief as an appellee to the Barge and Tug owners' appeals, and at the time of oral argument, Trexler's Estate moved the Court of Appeals to enter judgment against Crown. The Court of Appeals granted that Motion and originally ordered that the $96,388.59 Jones Act judgment granted Trexler's Estate against his employer by the District Court should be transferred to Crown. In modifications to its original decision, the Fourth Circuit acknowledges that the Jones Act death recovery cannot be imposed on Crown but has imposed a $30,000.00 judgment under the Virginia Death Act.

A simple comparison of the District Court's opinion with the original and modified opinions of the Fourth Circuit reveals that in exonerating the Barge and Tug owners from any liability, the appellate court has not only revised the District Court's factual findings (i.e., as to the proximate cause of the fire, as to the place where fire originally broke out and as to the cause of ignition), but also has revised the District Court's judgment, both revisions being in favor and for the benefit of Trexler's Estate, (a non-appealing suitor) and against Crown for whom final judgment was entered in the District Court and from which there was no appeal.

The decision of the Court of Appeals For The Fourth Circuit has thus created a new appellate doctrine by assuming jurisdiction and exercising the power (and obtaining the result) which this Court prohibited in *Morley Construction Co.* and subsequent decisions. Its

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impact on future litigation and appellate proceedings in multiple-party actions will be staggering. No longer will any litigant in multiple-party litigation be able to determine when his case is terminated. Every appellate hearing in multiple-party litigation will become a trial de novo regardless of the intent of the parties as expressed by their actions. The litigants in multiple-party litigation are enabled to abrogate statutory requirements for appeals, to ignore the Federal, Civil and Appellate Rules, to initiate cross-appeals without adequate time or opportunity for a defense and to assert cross-appeals after designation and transmission of the trial record (which may be incomplete) to the Court of Appeals. This massive departure from this Court's established precedent, usage and practice demands careful review, scrutiny and consideration before it is condoned, permitted and established as precedent for future multiple-party litigation.

II. The Decision Below Is Contrary To Federal Statute, 28 United States Code, §2107 And In Conflict With The Supreme Court's Decision In GEORGE v VICTOR TALKING MACHINE CO., 293 U.S. 377 Requiring An Appeal As A Jurisdictional Requisite In A Court Of Appeals.

Title 28 United States Code, §2107 (Appendix F, infra. pp. 81a) provides that a notice of appeal must be filed within 30 days after entry of a final judgment. In *George* v *Victor Talking Machine Co.*, 293 U.S. 377 (cited in many subsequent decisions in various Circuits)this Court held that the statutes limiting time for taking an appeal are mandatory and jurisdictional.

The District Court's final judgment absolving Crown from any liability to Trexler's Estate was entered

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on October 23, 1968. Yet that Estate has never filed notice of appeal or initiated any other appellate action. Consequently the court below was without jurisdiction as to any appellate proceedings between Trexler's Estate and Crown Central Petroleum Corporation.

In modifications of its original opinion, the Fourth Circuit excuses the jurisdictional requirements of 28 U.S.C., §2107, and *George* v *Victor Talking Machine Co.*, as being merely "a rule of practice" rather than a rule of law and relies on *Langnes* v *Green*, 282 U.S. 531 (1931) as authority.

Langnes (1931—not 1938) decided six years prior to *Morley Construction Co.* (supra) was an admiralty appeal which this Court treated as a *trial de novo* bringing up all issues between all parties and thus necessity of an appeal was only "a rule of practice". However, 23 years later in *McAllister* v *United States*, 348 U.S. 19 (1954) this Court abolished the *trial de novo* concept of admiralty appeals and of course the 1966 amendments to the Federal Rules require separate appeals in admiralty just as in any other case. 9 Moore's Federal Practice, P. 72.05(1) at 3019.

Moreover, in *Calhoun County, Fla.* v *Roberts*, 137 F.2d 130 (1943) the Fifth Circuit reviewed *Langnes*, pointing out that the so called "rule of practice" permits revision only of a District Court's conclusions of law—not of its factual findings, as was done in the Court below in this case.

In view of *George* v *Victor Talking Machine Co.* (1934), *Morley Construction Co.* v *Maryland Casualty Co.* (1937), *McAllister* v *United States* (1954), the statutory requirement of 28 U.S.C. §2107 and the current status of the Federal Civil and Appellate Rules, *Langnes*

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(1931) is devoid of persuasion or authority. In any event, the application of the 1931 "rule of practice" to the complexities of modern multiple-party litigation merits thorough review and consideration.

III. The Decision Of The Fourth Circuit Court Of Appeals Below Conflicts With Decisions In Other Circuits, Including The First Circuit's Decision In COCHRAN v M & M TRANSPORTATION CO., 110 F.2d 519 (1940) And The Sixth Circuit's Decision In RICHLAND KNOX MUTUAL INS. Co. v KALLEN, 376 F.2d 360 (1967).

In *Cochran* v *M & M Transportation Co.*, 110 F.2d 519 (1940) the First Circuit held that a litigant may appeal or cross-appeal from a District Court judgment which grants only partial relief, but in the absence of such appellate action, the District Court's judgment becomes res judicata as to the issues decided against the litigant.

The Sixth Circuit has ruled in *Richland Knox Mutual Insurance Co.* v *Kallen, etc.*, 376 F.2d 360 (1967) that if one of multiple parties fails to file a timely separate appeal or cross-appeal from an adverse District Court decision involving one or more of the other parties in the trial court, then that adverse portion of the District Court's judgment not only becomes final as to the non-appealing litigant but the Circuit Court of Appeals is without jurisdiction to act thereon even though other portions of the District Court's judgment are properly presented to the Circuit Court by timely appeal of other parties.

In this case Trexler's Estate failed to take any appellate action whatsoever from the District Court's final

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judgment. Consequently the District Court's judgment absolving Crown of any liability to Trexler's Estate would be res judicate as to that issue in the First Circuit and the Court of Appeals would be without jurisdiction to act thereon in the Sixth Circuit. The decision below thus creates a new and different standard for multiple-party litigation in the Fourth Circuit than is practiced in the First and Sixth Circuits. Uniformity of procedure and in application of precedent demands that these differences be reconciled.

IV. The Decision Of The Court Below Contravenes The Principles Of This Court's Decisions In McALLISTER v UNITED STATES, 348 U.S. 19 And GUZMAN v PICHIRILO, 369 U.S. 698 And Constitutes An Abuse Of The Appellate Function.

The trial *de novo* concept of an admiralty appeal was abolished by the principle of *McAllister* v *United States*, 348 U.S. 19 (1954) in which this Court ruled that the "clearly erroneous" rule applicable to other civil appeals also applies in admiralty. Moreover, Rule 52(a), F.R.C.P. (Appendix H, infra. pp. 83a) provides: "Findings of fact shall not be set aside unless clearly erroneous and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" Applying these principles in *Guzman* v *Pichirilo*, 369 U.S. 698 (1962) this Court held that a trial court's refusal to credit and accept irregularly developed, questionable or uncorroborated *ore tenus* testimony, cannot be considered "clearly erroneous."

Having exonerated the Barge and Tug Owners from the $96,388.59 Jones Act judgment and in order to grant the non-appealing Trexler Estate some recovery, the Court of Appeals below has conducted a trial de novo

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of these multiple-party suits which had consumed eight trial days in the District Court.

Specifically, the Court of Appeals: (1) was unable to cite any facet in which the District Court's detailed analysis and recital of evidence was either unsupported or uncorroborated; (2) selects and substitutes the evidence rejected for credibility reasons by the District Court as the basis of the Fourth Circuit's decision; (3) excuses Tankerman Smith's untruths, inconsistencies, contradictions and prior statements, saying Smith was not "an accomplished or an over-intelligent witness"; (4) credits, accepts and adopts Smith's testimony as a basis and justification for new and different factual findings, inferences and conclusions; (5) criticizes Assistant Terminal Superintendent Chadwick's testimony as being uncorroborated (a criticism prohibited by Guzman v Pichirilo); (6) relies on Chadwick and admittedly "speculates" that Crown's Shore-tank No. 19 overflowed and caused the fire, (Appendix D, infra. pp. 52a-78a); (7) without any evidence or basis, concludes that Chadwick committed suicide as a form of "flight" from his criminal guilt and guilty conscience for having caused the fire.

The Court below thus so far departed from the accepted and usual course of judicial proceedings in admiralty appeals as to call for this Court's supervision. Otherwise the Circuit Court's unfettered exercise of power will stand as precedent for any use or abuse of appellate function and discretion.

CONCLUSION

The crux of this Petition points directly to the effect of the Fourth Circuit's decision on the expanding complexities of multiple-party litigation.

For the foregoing reasons assigned herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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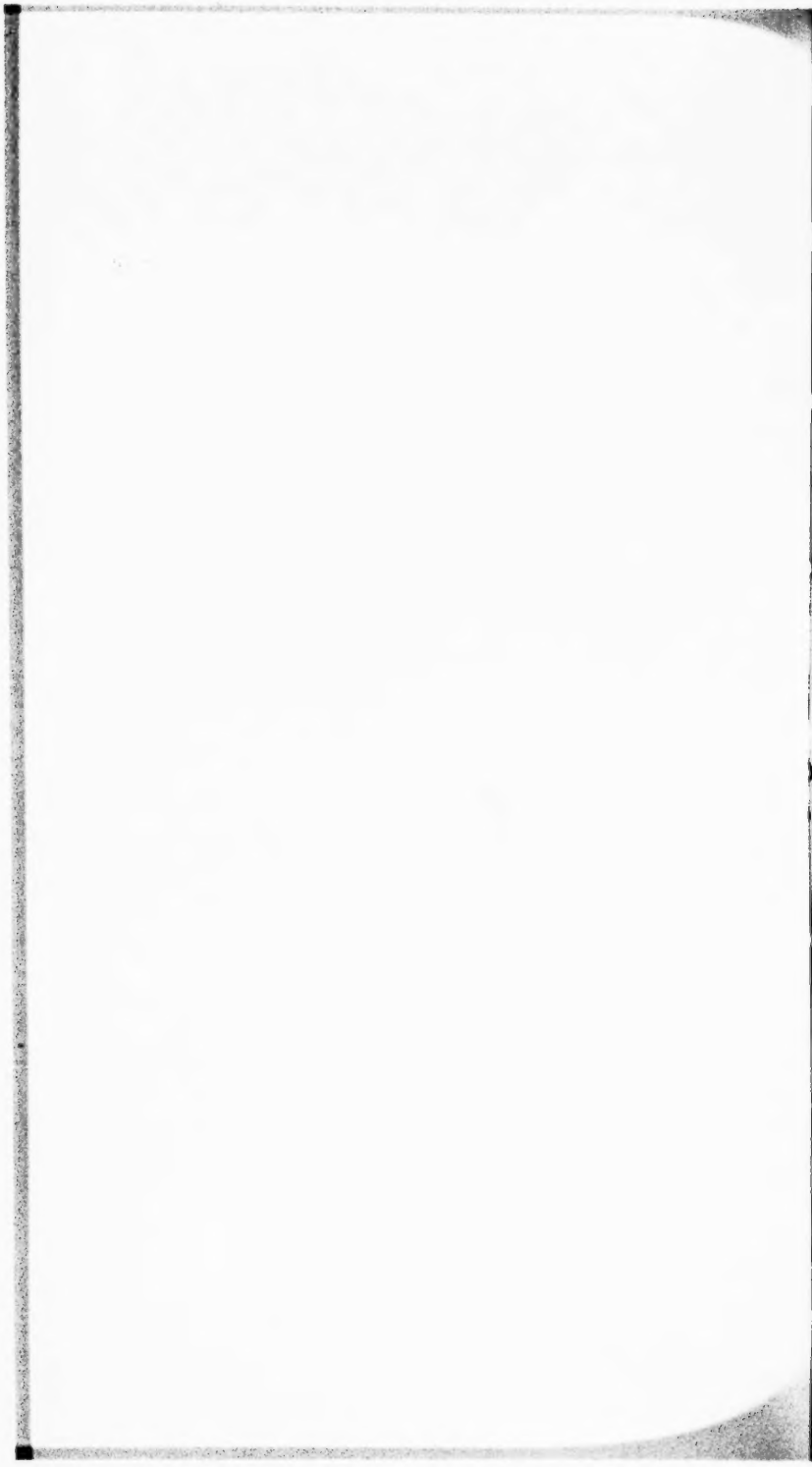

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District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Mrs. Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, deceased, *Libelant,* v. Tug RAVEN, et als, and Crown Central Petroleum Corporation, *Respondents.*	Admiralty No. 8210
In the matter of Petition of L & L Towing Corporation, et als, for exoneration from or limitation of liability.	Admiralty No. 8213
In the matter of Petition of Vermillion Towing Corporation, et als, for exoneration from or limitation of liability.	Admiralty No. 8214

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Crown Central Petroleum Corporation, *Libelant,*	)	
v.	)	Admiralty No. 8249
William W. Marshall and Richard S. Smith, *Respondents.*	)	
Margaret R. Cavedo, et als, *Libelants,*	)	
v.	)	
William W. Marshall and Richard S. Smith, *Respondents and Impleading Petitioners,*	)	Admiralty No. 8268
v.	)	
Crown Central Petroleum Corporation, *Impleaded Respondent.*	)	

MEMORANDUM

During the early morning hours of July 5, 1961, a disastrous fire broke out at the terminal of Crown Central Petroleum Corporation (Crown), located on the James River at Richmond, Virginia. At the time in

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question Tank Barge 104 (Barge),[1] with the Tug RAVEN (Tug)[2] alongside, was moored at the Crown dock discharging gasoline into Crown's storage tanks ashore. The fire brought about the death of a crew member of the Tug; the Tug and Barge were totally destroyed; Crown's dock and shoreside facilities were either destroyed or badly damaged; and the nearby homes and other property were likewise damaged or destroyed.

One William W. Marshall was the master of the Tug. Richard S. Smith was a mate on the Tug, but also served as licensed tankerman for the Barge which was unmanned. In these five consolidated actions, two of which are petitions for exoneration from or limitation of liability, the status of the claims of the respective parties may be summarized as follows: (1) Crown seeks to impose liability upon the Tug and Barge, their owners and charterer, as well as the master and tankerman, (2) Vermillion Towing, L & L, and Southern contend that Crown was responsible for the damage but, without conceding any fault on their part, they seek to limit their liability under the statute, 46 U.S.C., section 182 *et seq.*, (3) in the two limitation proceedings, one filed by L & L and Southern (in which William E. Law is also named

---

(1) Tank Barge 104 was owned by L & L Towing Corporation (L & L) and, at the time of the fire, was operated by Southern Transportation Company, Inc. (Southern). One William E. Law was a stockholder and chief executive officer of both L & L Towing Corporation and Southern Transportation Company, Inc. The Barge was at one time owned by Crown who sold same to L & L. Except as hereinafter indicated, the relationship between L & L and Southern will be referred to as a "charter" and Southern as the "charterer" but, for reasons stated, the true relationship was probably that of bailor (L & L) and bailee (Southern).

(2) The Tug RAVEN was owned and operated by Vermillion Towing Corporation. Robert R. Vermillion was a stockholder and chief executive officer of this corporation. Southern had previously owned the Tug, having sold same to Vermillion Towing less than three months prior to the fire.

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as a petitioner), the other filed by Vermillion Towing (in which Robert R. Vermillion and William E. Law are likewise petitioners), L & L and Southern filed a claim in Vermillion Towing's limitation action, and Vermillion Towing filed a claim in the limitation proceeding instituted by L & L and Southern, (4) William E. Law, Robert R. Vermillion, William W. Marshall, and Richard S. Smith have each filed counterclaims against Crown, (5) all of the corporations and individuals heretofore named seek indemnity or contribution for such losses to third parties as may be determined, (6) the Estate of Robert W. Trexler seeks damages against the Tug and Barge *in rem*, and *in personam* against the owners of these two vessels, the charterer of the Barge, William E. Law, Robert R. Vermillion, and Crown, and (7) other parties filed claims in the limitation proceedings and a few elected to proceed against the master of the Tug, the tankerman of the Barge, and Crown. This memorandum will be confined to the issues of liability as well as the damage claim of the deceased seaman's estate; the various property damage claims being reserved for an appropriate reference. Included in the issues of liability will be a consideration of the rights, if any, to limit liability.

Crown's terminal is situated between the 4500 block of East Main Street and the James River. The storage tanks are located on a hillside approximately 110 to 120 feet from the mooring dock to which the Barge was secured. The Tug was moored outboard at the bow end of the Barge when the fire broke out.[3] The unmanned Barge was a steel welded tank barge, length 194.7 feet,

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(3) The Barge was positioned by the Tug. The Barge was moored portside to the pier with its bow headed downstream. The Tug's bow was headed upstream, with the stern of the Tug protruding slightly downstream from the bow of the Barge.

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breadth 34.9 feet, depth 10.7 feet, with 8 cargo compartments (four each on the port and starboard sides). It was equipped with an eight-inch Blackmer displacement pump located on the after deck at the after end of the No. 4 tank, with a pumping capacity of 1,100 to 1,200 gallons per minute at 350 rpm. The Blackmer pump was installed by Southern subsequent to the sale of the Barge by Crown to L & L as heretofore noted. The Barge passed a Coast Guard inspection on May 17, 1961. The Tug was of wooden construction, length 54.4 feet, breadth 17.0 feet, depth 6.0 feet, propelled by a General Motors twin diesel engine. A raised pilot house was forward, following which was a cabin with four berths, an engine room, and a galley on the aft end of the house. In addition to the master (Marshall) and the mate (Smith), the other crew members were Trexler, the now deceased, who served as deckhand, and Carter, the cook.

The voyage of the Tug and Barge began at Norfolk on July 4, 1961. The Barge loaded part of its cargo in tanks Nos. 2 and 3 across for Phillips Petroleum Corporation, and part in tanks Nos. 1 and 4 across for Crown. The Tug picked up the loaded Barge and departed for Richmond at 9:15 a.m.[4]

The arrival of the Tug and Barge was anticipated by Crown. Chadwick, the Assistant Superintendent employed by Crown, was in charge. Around the middle of the day on July 4, Chadwick gauged shore tanks Nos. 18 and 19 which were to initially receive the product from the Barge. Tank No. 18, with a capacity of 158,188 gallons, indicated that it had 101,690 gallons then in it, leaving space for an additional 56,498 gallons. Tank No. 19, with a capacity of 70,110 gallons, was gauged at hav-

(4) Times shown in this memorandum are Daylight Saving Time. In some instances it has been necessary to convert the time from Standard.

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ing 8,223 gallons, leaving space for an additional 61,887 gallons.

When the Tug and Barge arrived at 11:30 p.m., the terminal was in charge of Price, a night watchman, who came on duty at 9:00 p.m. Price had already made one round of the terminal and, when the Tug and Barge arrived, he telephoned Chadwick[5] who came on the scene shortly thereafter. Chadwick proceeded with Smith to gauge the Barge's tanks which, according to gauging reports,[6] appeared to contain—

Tank No.	Innage	Gross Gallons	Grade
1—Port	7'4"	36,498	Silver
1—Starboard	7'5½"	37,129	Gold
4—Port	10'7"	52,777	Silver
4—Starboard	10'7"	52,777	Silver

Chadwick thereafter authorized the commencement of discharge operations at between 12:15 a.m. and 12:30 a.m. on July 5, 1961.

At midnight the night watchman, Price, began his second round. According to his testimony there were no leaks or other difficulties noted at the time. He made a third round at Crown's facilities at 1:00 a.m., and he did not notice any product spill or leaks in the area of the shore tanks or dock area. He indicated that this last round consumed approximately 15 minutes.

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(5) The Tug and Barge stress the fact that Chadwick committed suicide on July 22, 1961. We do not believe that such a fact carries with it any implication that Chadwick or Crown were at fault. While the casualty may have been a motivating factor in the suicide, we cannot agree with the Tug and Barge that the suicide act is a confession of guilt.

(6) There is a slight variance between the gauging reports following the completion of loading on July 3, 1961, at 9:30 p.m., and at the point of destination. The variance is not material.

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The certificated tankerman, Smith, was in general charge of discharge operations from the standpoint of the Tug and Barge. Prior to the commencement of pumping operations he checked the bonding cable and hose. He did not check the Tug, nor did he ascertain whether any of the crew was smoking. On the subject of flashlights, there were none aboard the Barge. Smith testified that the Tug had two workable Coast Guard-approved flashlights on board when the voyage started from Norfolk. Prior to pumping at Richmond he claims to have tested each of these flashlights but found them to be defective. He subsequently borrowed a flashlight from Chadwick which, he states, was not Coast Guard-approved. After a few minutes Smith dropped and broke the borrowed flashlight. He then went aboard the Tug and obtained a nonapproved flashlight from the engine room. It was this nonapproved flashlight that he was using at the time of the fire. Smith was fully aware of the dangers involved in using a nonapproved flashlight in the proximity of gasoline.

All witnesses agree that the valve setting on the dock manifold was open to shore tank No. 19 at the time of the fire, thus indicating that gasoline was pumping to No. 19. As all other valves appeared to be closed, it follows that the discharge into shore tank No. 18 had been completed. The best estimate of time required in pumping operations to No. 18 is approximately one hour. From the evidence it appears that the Barge had been discharging into No. 19 when the fire broke out. Chadwick had opened the valve to No. 19 and closed the valve on No. 18.[7] He then walked to shore tank No. 20, where

(7) By inference, at least, Smith denies that Chadwick ever changed any of the valve settings as he testified that he never saw Chadwick make the change and contends that he would have observed such action if it had been taken. The Court rejects Smith's testimony on this point.

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it was contemplated that the high-test gasoline would be pumped from the Barge and stored. Chadwick gauged No. 20 and then went to the plant office where he engaged in a brief conversation with Price, the night watchman. After approximately five minutes in the office, Chadwick went outside and started in the direction of the dock. He was, of course, facing the dock, the Barge and the Tug. At about that time he saw a fire near the end of the Barge closest to him. In a matter of seconds the fire erupted.

At this point it is well to consider the admissibility of Chadwick's testimony at a Coast Guard hearing on July 14, 1961—nine days after the fire and eight days before Chadwick committed suicide. The Tug and Barge, and their owners, vigorously contend that such testimony cannot now be considered. Disagreeing with this contention we find that all of the major parties were represented at the Coast Guard hearing; substantially similar issues were involved in that the Coast Guard was required to investigate the cause of the fire for the purpose of ascertaining whether personnel or vessels subject to their license had violated Coast Guard regulations; and a reasonably adequate opportunity was afforded all counsel in the cross-examination of Chadwick.[8] We agree with the Tug and Barge that, as a general rule, the only permitted use of testimony taken before a Coast Guard or Naval Board is confined to discrediting a wit-

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(8) The Coast Guard hearing reflects that, in addition to Crown's counsel, the following counsel were present and participating: Messrs. Jett and Ellis, representing the owner of the Tug and charterer of the Barge at said hearing, but who also represented in this litigation the owner of the Barge, William E. Law, Robert R. Vermillion, Richard S. Smith, and William W. Marshall; Sidney H. Kelsey, representing the estate of the deceased seaman, Trexler. Only the Virginia Electric and Power Company and certain property owners were unrepresented at the Coast Guard hearing, and they have not interposed any objection to the testimony.

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ness after first laying a proper foundation. *The Abangarez*, 60 F.(2d) 543, 1932 A.M.C. 1247 (E.D. La., 1932); *Griffin on Collision*, section 268. But in the latter authority it is also said:

> "It has been intimated also that the testimony of a witness at such a hearing may be used in the admiralty trial if the witness is deceased and if the party against whom his testimony is offered had adequate opportunity to cross-examine (*Sword Line* v. *Tug Joseph H. Moran*, 1944 A.M.C. 1375)."[9]

It seems that the better rule calls for the admissibility of Chadwick's sworn testimony before the Coast Guard. The requirements of oath and opportunity for cross-examination, even though it may be conceded that Chadwick could have been recalled (if living) for further examination, are present. The identity of parties and issues are substantially similar. *McCormick on Evidence*, section 230 et seq., pp. 480-492; *Wigmore on Evidence*, (3d Ed.) Vol. 5, sections 1386-1394, pp. 82-121.

The foregoing principle of law is supported by a long line of decisions, even in criminal cases.[10]

Tankerman Smith was aboard the Barge, apparently checking the No. 4 tank on the stern, when the fire broke out. It was the No. 4 tank from which gaso-

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(9) Also reported sub nom., *The Dixie Sword*, 57 F. Supp. 183, (E.D.N.Y., 1944).

(10) *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Motes* v. *United States*, 178 U.S. 458 (1900); *Mattox* v. *United States*, 156 U.S. 237 (1895); *Smith* v. *United States*, 106 F.(2d) 726, 728.
See also: 29 *Am. Jur.* (2d), *Evidence*, section 738; Annot., 70 A.L.R. (2d) 494; Annot., 159 A.L.R. 1240; Annot., 79 A.L.R. 1392; Annot. 15 A.L.R. 495.

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line was being pumped when the catastrophe occurred. There is a sharp dispute as to whether the fire started at the forward end of the Barge as contended by Smith and the owners and operators of the Tug and Barge, or whether it originated in the after end of the Barge as urged by Crown. We conclude that the greater weight of the credible evidence as corroborated by the physical facts leads to the finding that the fire commenced in the vicinity of the after end of the Barge.

There are four possible causes of the fire. At the outset it should be noted that, in order to create a fire, the three essential ingredients are fuel, oxygen and ignition. Fuel existed by reason of its presence in the Barge, the Crown shore tanks, and at least the pilot light in the Tug's galley. Oxygen was in the atmosphere. Turning to the ignition we find the possibilities to be (1) friction from the use of the nonapproved flashlight by tankerman Smith, (2) spark caused by friction of the Tug and Barge being moored together, and (3) presence of a burning pilot light in the galley stove of the Tug. The Tug and Barge urge that Crown permitted a shore tank to overflow, thus allowing the fuel to run down the slope of the hill into the water near the forward end of the Barge and that, in some unexplained manner, the fuel ignited either by reason of the friction caused by the Tug and Barge being moored together or possibly by an arc being formed between the pilot light on the galley stove and the fuel which allegedly had accumulated on the water immediately forward of the Barge or, as an alternative, by the fumes escaping from the No. 1 starboard compartment on the Barge. We agree with the Tug and Barge that, if the weight of the credible evidence established that a shore tank overflowed, Crown would at least be partially at fault and perhaps would be solely responsible. We do not think, however, that the credible evidence supports this argument.

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Marshall, the Tug's master, Trexler, the deckhand, and Carter, the cook, were all aboard the Tug at the time the fire broke out. Smith, the mate of the Tug and tankerman of the Barge, was admittedly at the No. 4 starboard compartment of the Barge at the crucial moment. The lives of Marshall, Carter and Smith were saved by jumping into the water. Trexler, however, endeavored to cross the Barge in an effort to reach the dock. He was caught in the fire, severely burned, and later expired.

Price, the night watchman, and Chadwick place the initial outbreak of the fire near the stern of the Barge in the vicinity of the No. 4 tank compartments. Carter first saw the fire near the bow of the Barge. Smith contends that he was facing north and that he turned around and saw the fire "in back of Trexler" who was then near the forward end of the Barge. As to Carter's testimony, it should be noted that he "looked to stern of tug" which was, of course, the bow of the Barge. Thus, Carter looked to his right as he came out the galley door of the Tug. He then rushed back to his room on the Tug and went overboard. Carter does not state that he looked for any fire toward the aft end of the Barge.

We think it significant that the burned flashlight was found in the vicinity of the No. 4 starboard compartment of the Barge and a fire extinguisher was likewise located lying near or against a cleat situated starboard of the aforesaid compartment when five men visited the Barge on July 7, two days after the fire. The flashlight was within 1 to 1½ feet of the dome of the No. 4 starboard compartment, lying slightly forward and a bit to its starboard. When the flashlight was picked up, there remained a light mark on the deck immedi-

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ately under where the flashlight had been resting; a strong intimation that the flashlight had been in this position during the fire. There were two fire extinguishers found aboard the Barge; one mounted on a pipe or pole in the forward portion of the Barge, which was in its housing with its pin in proper place;[11] the other situated as heretofore described, out of its housing with the safety pin and ring not there, affording credible circumstantial evidence that there had been an attempt made to use the fire extinguisher. There is no evidence in this record indicating that this particular fire extinguisher was out of its housing or had been used prior to the outbreak of the fire. Obviously, tankerman Smith was the only person who could have reached this extinguisher after the fire started and, in addition, it was on the starboard side of the Barge in the general area where Smith went overboard. To remove the fire extinguisher from its housing or brackets would require that it be lifted upward to clear both rings and, at the time of the inspection on July 7, the rings were in place and apparently not distorted or damaged, although the extinguisher was on deck. Smith emphatically denies the use or attempted use of any fire extinguisher.

We find that Smith, despite his assertions to the contrary, at least attempted to use the fire extinguisher. If the outbreak of the fire had been near the bow of the Barge, it is reasonable to assume that the extent of the fire would have been so great by the time it spread to the area of the No. 4 starboard compartment that Smith would not have even thought of the fire extinguisher in his haste to leave the Barge. It is likewise reasonable to assume that the fire broke out in the No. 4 starboard

(11) The pin referred to as being on the fire extinguisher is placed there for safety reasons to prevent an accidental discharge. While the pin is in place, the extinguisher will not discharge or operate.

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compartment and that the initial blaze was sufficiently confined to lead Smith to the belief that perhaps the fire extinguisher would be effective. While it is possible that Smith may have grabbed the extinguisher for the purpose of affording himself a chance to jump overboard, especially if the fire was spreading from the bow to the stern of the Barge, this possibility is rejected in light of Smith's statement to the effect tha he never used or attempted to use the extinguisher. The Tug and Barge argue that some third person could have boarded the Barge on some occasion between the early morning hours of July 5 and the time the Barge was boarded by five men on July 7. Acknowledging that there is such a possibility, we must remember that this was a steel welded barge and the heat from the fire would be rather extreme for many hours after the blaze was extinguished.

There are certain inconsistencies in Smith's testimony which bear scrutiny. Smith at first stated that Trexler was "on fire" when he initially saw him near the bow of the Barge. Following a recess Smith stated that he misunderstood the question and that Trexler was not "on fire" when he first observed him. Also, while it is possible that Smith was facing north, with his back to Trexler, he would have been facing in that direction solely for scenery purposes as the hinges on the No. 4 starboard tank cover are on the forward end of the cover and, when opened, the cover sits up at an angle of approximately 45 degrees, thereby making it highly improbable that the tankerman would have been doing any work facing toward the stern of the Barge, unless he was engaged in shifting the valves which operate the suction lines and stripping lines of the No. 4 port and starboard compartments which valves are located slightly aft, but in the immediate vicinity of, the manhole trunks. For what it may be worth, one Kirtley, the assistant

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terminal superintendent for Crown, testified that, in subsequent conversations with Smith, it was apparent that Smith did not know where the fire started.[12]

The principal argument by the Tug and Barge to refute the contention that the fire originated in Smith's area is the fact that Smith was not actually burned, although there was black soot on his face while he was standing alongside the ambulance waiting to enter same. The fact that Smith was not burned is inconclusive as to the origin of the fire. Concluding that the fire originated in the No. 4 starboard compartment by reason of Smith's use of a nonapproved flashlight, it is not unlikely that the initial outbreak was of insufficient intensity to burn the face or body of the holder of the flashlight, and that this prompted Smith to run for the fire extinguisher.[12A]

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(12) Kirtley's testimony in discovery on this point is as follows: "One time he [Smith] told me there was a fire in the river, the next time he told me that Bob Trexler had hollered at him and said there was a fire. He said, 'I don't know where it was, but I ran.'" Smith does state that he heard somebody holler.

(12-A) Not overlooked is the fact that Law, his brother-in-law (Lynch), and Kirtley, boarded the Barge on July 5 for the purpose of gauging the Barge's compartments to ascertain the fuel loss in the No. 1 and No. 4 tanks; the No. 2 and No. 3 tanks not having been for Crown. Law testified that this visit to the Barge was on the morning of July 5; Kirtley said it was during the afternoon; Lynch did not testify. It is obvious that this visit was solely for the purpose of gauging the tanks, and none of the parties observed the flashlight or fire extinguisher. Law only related the positions of the tank tops, with Nos. 2 and 3 in position (covering the tanks); No. 1, port and starboard, were on the deck alongside the dome; No. 4, port and starboard, were likewise on the deck near the dome. The covers were replaced by this group. Crown's expert Venable, Bray (an insurance adjuster), and Kirtley apparently went aboard the Barge on the morning of July 7, accompanied by Bowman (Chief of Fire Prevention in Richmond) and Hudgins (Terminal Manager for Crown). Bowman did not testify. Hudgins was not examined as to this point. It is, of course, possible that someone went aboard the Barge and removed the fire extinguisher during the fire such as, for example, a fireman, but we believe that the thorough investigation conducted by all parties would have disclosed this individual if such had occurred.

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The very purpose of the Coast Guard regulation requiring the use of approved flashlights is to eliminate dangers occasioned by a spark created by opening or closing the switch, breaking the bulb, or permitting the metal case on the nonapproved flashlight from striking against other metal. Smith, the tankerman, conceded that he was aware of these potential dangers, but nevertheless used the nonapproved flashlight as it was the only one available. Smith further admits that, in order to gauge the tank compartments on the Barge, it was necessary for him to use a flashlight to look in the open tank top with the screen removed.

In concluding that the sole proximate cause of the fire was Smith's use of the nonapproved flashlight, we have not overlooked the expert testimony adduced. It has been of material assistance in resolving the technical aspects of the case but, in the final analysis, the cause of the fire essentially stands or falls on the credibility of Smith's testimony. Analyzing this evidence it appears to be replete with uncertainties and contradictions. He stated that he used a Coast Guard-approved flashlight during the loading operation at Norfolk, and the Court accepts this as a fact. He also testified that there was another Coast Guard-approved flashlight "available" at that time, but the Court seriously questions that a second approved flashlight was available and in operating condition.[13] In fact, from an analysis of his testi-

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(13) When questioned as to the approved flashlights aboard the Tug, Smith concedes that the approved flashlight or flashlights had not been used since the loading was completed at Norfolk. He continuously refers to the word "it" in speaking of flashlights, and commented as to the many "troubles" any tankerman has "with them lights." Smith stated he "tried *it* out on the boat while in the wheelhouse, before we started pumping." When questioned by the Court as to how many lights he tried out, Smith answered, "Both of them" and that each was defective.

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mony and Smith's reaction to questions propounded, the Court finds that there was only one operable Coast Guard-approved flashlight aboard the Tug when the Tug and Barge departed from Norfolk en route to Richmond, and that there were no flashlights of any description aboard the Barge.

INDIVIDUAL LIABILITY OF LAW AND VERMILLION

Trexler's Estate seeks to impose personal liability upon William E. Law and Robert R. Vermillion. It is

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(13) (continued)

He further said: "They would not light, no, sir. One of them, I tried it two or three times to try to get it to light and I could not get it to light. I don't know, we have trouble with them every now and then. But to state what time we had them, I could not tell you." Smith indicated that he had no prior trouble with one flashlight, but had encountered difficulty with the other one. He conceded that, on discovery when questioned about trying out the approved flashlights, he had stated: "One was torn down and on one the batteries and bulb wouldn't work." The Court finds that when the Tug left Norfolk it had only one operable Coast Guard-approved explosion-proof flashlight aboard, and that the other flashlight was inoperable. It is singularly strange that Carter, the deckhand and cook on the Tug who also held a tankerman's ticket, testified that when all four crew members were in the galley drinking coffee, he saw a Coast Guard-approved flashlight on the galley table. This may have been prior to the time that Smith and Chadwick, accompanied by the other crew members on the Tug, commenced taking samples and gauging the compartments. Apparently, however, Smith never reported to the other crew members the nonoperating condition of any light. According to Smith, he used Chadwick's flashlight to gauge the tanks, and he did not know whether this was Coast Guard-approved. He advised Chadwick that he needed a light and the latter left with the flashlight previously used by Smith in gauging the compartments. After Chadwick checked his shore tanks, Smith returned to the galley for another cup of coffee and thereafter Chadwick returned with a flashlight. Smith used this light for a "few minutes," dropped it, and broke same. He claims that the flashlight delivered to him by Chadwick was nonapproved, but as this light had nothing to do with the fire it is immaterial to make any such finding. After breaking Chadwick's flashlight, Smith returned to the Tug and procured the nonapproved flashlight from the engine room, which flashlight he was using at the time of the fire.

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for this reason that Law and Vermillion joined in the petitions for exoneration from or limitation of liability. We need not discuss the limitation issue as we conclude that these individuals must be exonerated as to any personal liability.[14]

The theory advanced by Trexler's counsel is that the corporate veil should be pierced. That Law and Vermillion worked hand-in-hand, with Law the dominating factor, cannot be disputed. Nevertheless, the three corporations, Southern, L & L and Vermillion Towing were separate legal entities.

This conclusion is fortified by ***Zubik*** v. ***Zubik,*** 384 F.(2d) 267 (3 Cir., 1967), cert. den., 390 U.S. 988. In that case, which involved a limitation of liability proceeding, there was a vigorous effort to pierce the corporate entity and the trial court found that there was no line of demarcation between the individual and corporate defendants. In an exhaustive opinion by Circuit Judge Van Dusen[15] on factual evidence believed to be considerably stronger to justify disregard of the corporate entity, it was recognized that the corporate entity, as a general rule, must be upheld in the absence of specific, unusual circumstances calling for an exception. Moreover, it was pointed out, a disregard of the corporate existence occurs only when the court must prevent fraud, illegality, injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime. In distinguishing

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(14) In concluding that Law and Vermillion are not individually liable, it does not follow that there was any lack of privity or knowledge on their part.

(15) Judge Van Dusen sat as a member of the Court of Appeals while a district judge. Following oral argument in the case, he was subsequently appointed to the Court of Appeals.

between cases in bankruptcy or taxation on the one hand, it is suggested that in the first line of cases there is a certain degree of reliance by the damaged party, whereas an injured tort claimant stands on a different footing. As stated in *Zubik*:

> "Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity. The corporate form itself works no fraud on a person harmed in an accident who has never elected to deal with the corporation."

While it is true that Trexler, as a member of the crew of the Tug, came in constant contact with Law and Vermillion[16] he was carried on the books as an employee of Vermillion Towing from the time the Tug was purchased from Southern in April 1961, except for nine (9) days in June when Trexler was employed by Southern as a relief man on the tug SHRIKE. Knowing Law's interest in operating the Barge and contracting for the services of the Tug, it is not unlikely that Trexler may have worked in conjunction with Law, but he at all times knew that he was under the direct employ of Vermillion Towing and certainly was not the victim of any fraud.

Finding that the evidence is insufficient to justify the piercing of the corporate veil, there is no personal liability upon Law or Vermillion.

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(16) Southern, having chartered the Barge from L & L, had a working agreement with Vermillion Towing to the extent that Southern had first claim upon the services of the Tug and its crew.

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LIMITATION AS TO THE BARGE AND LIABILITY OF SOUTHERN AND L & L

Both L & L as the owner, and Southern as the charterer or bailee, knew that the Barge was not equipped with any flashlight, to say nothing of Coast Guard-approved flashlights. Southern, under 46 U.S.C., section 186, may be deemed to be the owner of the Barge for the purposes of limitation of liability proceedings if, in fact, a charter actually existed. Aboard the Barge was a storage box or tool box where certain Barge equipment was maintained. Law, as the principal corporate officer of L & L and Southern, and as a certified tankerman in his own right, knew that Coast Guard-approved flashlights constituted a part of the necessary equipment of the Barge in loading and unloading fuel.[17] Neither Law nor any corporate officer of Southern or L & L ever made any attempt to check as to the availability of Coast Guard-approved flashlights on the Tug; neither did Law nor any other corporate officer ever ascertain whether the tankerman brought his own Coast Guard-approved flashlight aboard the Barge or Tug when reporting for duty.

It is a general rule of law that the owners of a vessel, and in this case Southern, owe a duty to see that the equipment of a vessel is in safe condition for use when the voyage is commenced. This duty is a personal one, the responsibility for which they cannot escape by

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(17) On this point, Law was questioned and, in turn, answered:

"Q. As an officer of these corporations [Southern and L & L], did you expect the tankerman who would operate this barge during discharge to acquire his flashlight from whatever tug was towing the barge on that particular occasion?

"A. Either for him to have his in his possession or to acquire it from the tug boat."

delegating its performance to another.[18] In this case, Southern, acting through Law, its principal corporate officer and general manager, attempted to delegate the responsibility of providing approved flashlights to the Tug or tankerman who, incidentally, was a member of the Tug's crew.

Aside from the foregoing, it seems fundamental that any barge operator would be aware of the possible breakage or nonoperating condition of an approved flashlight. Law conceded that he was familiar with C.G. Reg. 35.30-30 pertaining to Portable Electrical Equipment which reads:

> "Illumination may be obtained in any compartment by the use of approved explosion-proof, self-contained, battery-fed lamps; otherwise, no portable electrical equipment of any type shall be used in bulk cargo tanks, fuel oil tanks, cargo pump rooms, or even closed spaces."

We think it clear that the Barge was unseaworthy at the commencement of its voyage by reason of lack of proper equipment, and for the additional reason that no effort was made to ascertain whether the proper equipment was readily available in the important function of loading and discharging a highly combustible cargo. Assuming that one approved operable flashlight was available at the start of the voyage, no provision was made for potential breakage, loss overboard, or the many contingencies that might arise. Since knowledge of the unseaworthiness of a vessel defeats the right to limit liability, the petitions of Southern and L & L are denied.

We go further and find that Southern was guilty

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(18) *Christopher* v. *Grueby*, 40 F.(2d) 8. 12 (1 Cir., 1930).

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of negligence in failing to exercise due care in ascertaining whether the tankerman and/or the Tug were possessed of the proper equipment to carry out the discharge operation. According to Southern, Smith was its employee during such operation. Actually Smith was a regular employee of Southern who, at Law's suggestion, was hired by Vermillion Towing as mate on the Tug with the additional duty of serving as tankerman on the Barge during loading and discharge of the cargo. While Smith was apparently paid by Southern for his services as tankerman, the contract between Vermillion Towing and Southern provided that, "If during such operation Vermillion's personnel on its tug performs the necessary services in loading or discharging the said barge or other vessel of Southern, Vermillion is to receive an additional sum of $18.00 for each such loading or discharge." Thus, while Smith was directly paid by Southern, it was merely a compliance with the contract which, in turn, provided that Southern would pay Vermillion Towing, and the latter presumably would then have been required to pay the tankerman.

The *in personam* liability of L & L presents a different question. An owner who demises his vessel is generally not liable to anyone but the demisee under the warranty of seaworthiness for any loss or injury during the demise. However, if the unseaworthiness existed at the time of the demise, the ultimate liability may rest upon the owner, either under an action by the demisee against the owner or in joint or separate actions against the demisee and/or owner. *Cannella* v. *Lykes Bros. S.S. Co.*, 174 F.(2d) 794 (2 Cir., 1949). In this case it is clear that L & L, for all purposes, turned the Barge over to Southern as soon as title was acquired from Crown. We cannot find from this record that the Barge

was unseaworthy at *that* time and, therefore, *in personam* liability cannot be imposed upon L & L.

We have serious doubts that a charter relationship existed between L & L and Southern. True, Law speaks of a charter and points to the change in the pumping system accomplished by Southern after L & L turned the Barge over to Southern. No charter agreement between L & L and Southern was introduced in evidence. If one existed, it was verbal with Law talking as the principal corporate officer and one-third stockholder of L & L, and Law listening as the president, general manager and 50% stockholder of Southern. When Southern conferred with L & L, it was Law doing the talking in behalf of Southern, and Law listening in behalf of L & L. As observed in footnote (1), it appears that the relationship was more in the category of a bailer-bailee. The record does not disclose the terms of the arrangement between L & L and Southern. L & L had no employees and had been in existence less than three months when the Barge was destroyed. In *Jones & Laughlin Steel Corporation* v. *Vang*, 73 F.(2d) 88 (3 Cir., 1934), Jones & Laughlin endeavored to limit its liability to the barge and her pending freight when a barge, owned by Vesta Coal Company and loaded with coal, broke loose from other barges owned by Jones & Laughlin after delivery had been made by Vesta Coal. The Court held that Jones & Laughlin could not limit its liability because it was not, in fact, a charterer of the barge, but was a mere bailee. Reference is made to the requisites of a charter party as set forth therein (73 F.(2d) 91). This is an additional reason why Southern should not be permitted to limit its liability.

There is much to be said for the argument that Smith was a joint employee of both Southern and Ver-

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million Towing. Even in the case of an independent contractor relationship, it is apparently possible for an employee to serve two masters where the work to be performed is of mutual interest to both of two employers and to effect their common purpose. *Dickerson* v. *American Sugar Refining Co.*, 211 F. (2d) 200, 203 (3 Cir., 1954). If ever there was a case of a common employee, this seems to be it. Smith was serving as mate on the Tug owned and operated by Vermillion Towing, and as tankerman on the Barge operated by Southern. For the purpose of this venture, the Tug and Barge were one unit with a common purpose of transporting, delivering and discharging cargo. Additionally, Southern and Vermillion Towing dealt almost exclusively with each other in this type of venture, and their activity was so intertwined in management and operation that one cannot readily draw a line between the purpose of one or the other, nor can one with assurance determine the attendant control of the employees. In addition to the reasons heretofore stated for imposing *in personam* liability upon Southern—as well as the reasons hereinafter set forth for finding *in personam* liability against Vermillion Towing — we hold that there was mutual employment of Smith and his negligence is binding upon both Southern and Vermillion Towing.

Assuming arguendo that mutual employment is not a proper basis for affixing *in personam* liability upon Southern, and accepting for the purpose of discussion that Vermillion Towing was an independent contractor hired by Southern, there are further grounds for imposing liability upon Southern. If the activities of the hirer (Southern) and the independent contractor (Vermillion Towing) are so interrelated that the failure to supply proper equipment and/or the use of improper equipment are productive of concurrent negligence, then joint

liability is imposed. *Sun Oil Co.* v. *Kneten,* 164 F.(2d) 806, 809-10 (5 Cir., 1947). The nature of the activity in loading and discharging the combustible fuel is recognized as a hazardous undertaking and in *Restatement, Torts,* sections 416, 427 and 427A, it is generally provided, as an exception to the rule that the hirer (Southern) is not liable to third persons for losses attributable to negligence of the independent contractor (Vermillion Towing), that if the nature of the work to be performed imposes a nondelegable duty upon the hirer, or if the work is an inherently dangerous undertaking, then the hirer is answerable in damages to third persons injured as a result of negligent performance of the independent contractor to whom he delegates actual performance. *Capitol Chevrolet Co.* v. *Lawrence Warehouse Co.,* 227 F.(2d) 169 (9 Cir., 1955).

We conclude, therefore, that Southern is liable *in personam* to all parties, other than Vermillion Towing, who have sought relief against Southern.

As to L & L, this corporation was merely a "dummy" entity organized for the purpose of holding legal title to the Barge. It had no employees and assuredly Smith was not performing work for L & L at the time and place in question. It had no assets other than the Barge which was sold for $2,500 after the fire. While L & L, as the owner of the Barge, loses the value of the Barge by reason of its unseaworthiness during the time it remained in the possession of Southern, we are unaware of any rule of law which would justify the imposition of *in personam* liability upon L & L. This issue is probably academic in any event.

LIMITATION AS TO THE TUG AND LIABILITY OF VERMILLION TOWING

More difficult is the status of the Tug. Standing alone, and assuming that the Tug was not required to provide the approved flashlights or otherwise ascertain their availability, the owners of the Tug would be entitled to exoneration but for the peculiar circumstances of this case.

As heretofore noted, the Barge was unmanned. Smith, the mate on the Tug, was paid by Vermillion Towing. He was also paid by Southern for his services as tankerman (although the contract specified that Southern was to pay Vermillion Towing); however, this was additional pay and no deduction was made by Vermillion Towing for the time spent in loading or discharging the Barge[19] as Smith was paid by the day for his services as mate on the Tug.

The Tug pushed the Barge from Norfolk to Richmond. As such, it was an integrated tow operating as one unit. The pertinent question is whether the owner of the Tug, *having assumed the responsibility of providing crew personnel and necessary equipment in loading and discharging this unmanned Barge,* may now be exonerated or otherwise limit its liability where the equipment is inadequate and the Tug owner is chargeable with knowledge of such facts. While the issue is

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(19) The arrangement between Southern and Vermillion Towing called for Southern to pay $36.00 for services in loading and discharging the Barge. Customarily, Marshall (the master) and Smith (the mate) worked together in performing the duties of the tankerman. However, on this particular voyage Smith was to receive the entire $36.00. While the record is not clear as to the reason for this change of procedure, it is perhaps occasioned by the fact that Marshall did not assist in the loading operations at Norfolk and did not report for duty until after the Barge was fully loaded.

not free from doubt, we arrive at a negative answer to this inquiry.

It is not disputed that Vermillion Towing, acting through its principal corporate officer, Robert R. Vermillion, assumed the responsibilities aforesaid.[20] The contractual agreement between Southern and Vermillion Towing specified that Southern would pay Vermillion Towing for crew members performing tankerman's services on the Barge, the aggregate sum of $36.00 for loading and discharging.

The precise authorities are sparse. Touching generally on the subject is *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, 127 F.Supp. 469 (E.D.La., 1954), affirmed in part and reversed in part, 230 F.(2d) 346 (5 Cir., 1956). The principal distinguishing feature with the case at bar is that, in *Hartford,* the tug and barges were apparently under common ownership. The three barges were apparently unmanned and the tug crew performed the duties of discharging the barges. The Court of Appeals found that one of the barges was unseaworthy because the discharge line was open, and on the issue of responsibility said (230 F.(2d) 352):

> "The ultimate responsibility for making sure that all cargo lines were flanged, before the tow left Texas City, lay with the tow's master or with its pilot, who supervised the loading operation there."

(20) Vermillion testified as follows:

"Q. Were you aware that the crew of the Tug RAVEN would have to use the RAVEN flashlights when they went aboard the Barge 104 to service them?

"A. Yes, sir, they would have to use a flashlight.

"Q. Were you aware they had to use the flashlights from onboard the Tug RAVEN?

"A. Yes, sir."

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For the purposes of the Limitation Statute, 46 U.S.C., sections 181-196, where the Tug and Barge are engaged in a single venture and under common ownership, the two vessels are generally regarded as a single unit and must be surrendered. *The Alvah H. Boushell,* 38 F.(2d) 980 (4 Cir., 1930); *United States* v. *The Australia Star,* 172 F.(2d) 472 (2 Cir., 1949); *Standard Dredging Co.* v. *Kristiansen,* 67 F.(2d) 548 (2 Cir., 1933); *In Re United States Dredging Coporation,* 264 F.(2d) 339 (2 Cir., 1959). The authorities, while tending to emphasize the importance of a common adventure, do not materially assist in resolving the problem. In the present case there existed a common venture but no common ownership and, in addition, both the Tug and Barge were surrendered by their respective owners. Moreover, even in common ownership and single venture enterprises, it does not always follow that all vessels must be surrendered. *Liverpool, etc., Nav. Co.* v. *Brooklyn Terminal,* 251 U.S. 48 (1919).

Tested by these principles, the ultimate responsibility for providing adequate equipment for discharging the Barge in the present case rested upon Vermillion Towing in light of the fact that it controlled the Barge, assumed the obligation to provide a sufficient supply of approved flashlights, and supplied the personnel to carry on discharge operations. Marshall, the master of the Tug, admitted that, as master, he controlled the Barge.

On the subject of privity and knowledge of Vermillion Towing, much the same situation is presented with respect to approved flashlights as exists with Southern. Robert R. Vermillion knew that the crew of the RAVEN would, from time to time, act as tankermen on the Barge. He was aware of the necessity of approved flashlights for use in loading and discharging. Indeed

he, like Law, Marshall, Smith and Carter, were all certificated tankermen. He never gave any instructions to any of the crew as to the use of flashlights, but assumed that a tankerman would know his business. He had no recollection of ever inspecting the Tug (following his initial inspection when the Tug was purchased in April at which time he *thinks* that there were three approved flashlights aboard) for the purpose of ascertaining whether a supply of approved flashlights was aboard the Tug. He testified that he would have supplied flashlights only if requested to do so by the crew, and had no recollection of any such request being made.[21] Vermillion conceded that a tug could use any type of flashlight, and that only a barge required the Coast Guard-approved flashlights.

Since Vermillion Towing manifestly assumed the obligation of maintaining the approved flashlights for the Barge, and since its failure to do so rendered the Barge unseaworthy, Vermillion Towing is not entitled to exoneration from or limitation of liability, and is likewise liable *in personam*.

THE CLAIMS OF L & L AND SOUTHERN IN VERMILLION TOWING'S LIMITATION ACTION, AND THE CLAIM OF VERMILLION TOWING IN THE LIMITATON PROCEEDING FILED BY L & L AND SOUTHERN

Because of the reasoning heretofore stated, there is no right on the part of L & L or Southern to be considered as a claimant in the limitation proceeding filed by Vermillion Towing, nor is there any right of Vermillion Towing to claim under the limitation action filed by L & L and Southern. They were, in effect, joint tortfeasors in a noncollision maritime injury case and are not entitled to contribution. *Halcyon Lines* v. *Haenn*

Ship Corp., 342 U.S. 282 (1952). Nor is there any right of indemnification. *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, 230 F.(2d) 346, 354 (5 Cir., 1956).

Assuming arguendo that Vermillion Towing is entitled to exoneration on the flashlight issue, we think that there is an added reason why Vermillion Towing cannot claim against L & L or Southern. While mooring the Tug fast to the Barge during discharge operations was not a proximate cause of the fire's origin, it was an unsafe procedure the risk of which was assumed by Vermillion Towing, thus barring any right to successfully claim against L & L or Southern.[21A]

THE COUNTERCLAIMS OF LAW, VERMILLION, MARSHALL AND SMITH AGAINST CROWN

Since the Court has determined that Crown was not responsible for the fire and resulting injury or damage, these counterclaims must fall.

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(21) Marshall, the master of the Tug, testified that written requisitions were delivered to Vermillion for all supplies. No requisitions were introduced in evidence. As no crew members indicate that any requisition for approved flashlights was ever made, we assume that none were purchased after the Tug was acquired on or about April 15, 1961.

(21-A) It may be argued that Crown should likewise be barred from recovery as the testimony of Hudgins reveals that he and Chadwick were cognizant of the fact that such practice was generally regarded as unsafe. However, since the Court has determined that Smith's actions constituted the sole proximate cause of the fire, we do not believe that the unsafe practice, assuming that it existed, should bar Crown's right to recover. Primarily, at least, the practice of restricting the mooring of the Tug to the Barge is for the safety of those vessels and the parties aboard same. It is hardly a foreseeable circumstance that Crown's property ashore would have been destroyed.

THE INDIVIDUAL LIABILITY OF MARSHALL, THE MASTER OF THE TUG, AND SMITH, THE TANKERMAN OF THE BARGE AND MATE ON THE TUG

The actions of Smith constituted gross negligence of a high degree and he is individually liable to those parties who elected to proceed against him. Smith's carelessness, while gross, fell short of being criminal negligence. The liability of Smith is independent of the liability of Southern and Vermillion Towing. It stems from the servant's common-law obligation so to use that which he controls as not to injure another. In the very performance of his duties as tankerman in discharging fuel, Smith owed a duty to the public, as well as to his employer. 57 *C.J.S., Master and Servant*, section 577, pp. 345-6.

Turning to the personal liability of the master of the Tug, Marshall, we are confronted with a different situation. There is no conflict in the evidence as to the fact that, on this particular trip, Smith was solely performing the duties of a tankerman although it is not unlikely that Marshall should have assisted. In a strictly legal sense Marshall, as master of the integrated tow, was in control of everything on the Tug and Barge in that all things were under his command.

Under 46 U.S.C., section 187, it is expressly provided that nothing in the prior limitation statutes[22] shall be construed to take away or affect the remedy against the master (subject to exceptions), nor to lessen or take away any responsibility to which any master or seaman of a vessel may by law be liable. As early as 1865 the Supreme Court pointed out that the purpose of

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(22) 46 U.S.C., sections 182, 183, 184, 185, 186.

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the limitation sections was to release the owner from some liability for conduct of the master and other agents of the owner, for which the master or other agents were themselves liable; i.e., negligence and fraud. *Walker* v. *The Transportation Co.*, 70 U.S. (3 Wall.) 150, 153. Presumably the master and individual crew members are suable personally for their negligence, fraud, or other malversation.[23]

In view of the fact that this was a non-collision maritime injury, we advert to the common law principles of master and servant to determine the issue of Marshall's individual liability. We conclude, on the evidence presented, that Marshall is not personally liable. There is no showing that he had knowledge of the fact that Smith was using a non-approved flashlight during discharge operations, nor did he observe the type flashlight being used at the time. An employee who does not participate in the acts of another employee of a common master, on which it is sought to predicate liability to a third person, is not liable for such acts.[24] Even as to Trexler, Marshall cannot be held liable.[25]

We do not believe that liability can be imposed upon Marshall merely because he was unaware of the lack of operable Coast Guard-approved flashlights aboard the Tug and Barge. The duty to properly equip the vessel rests with the owner or operator,[26] and, while a master may be individually liable if he knowingly permits or orders the use of obviously improper

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(23) Edelman, *Maritime Injury and Death*, Vol. 1, p. 577.
(24) 57 *C.J.S.*, *Master and Servant*, section 577, p. 348.
(25) 57 *C.J.S.*, *Master and Servant*, section 578, p. 350.
(26) 57 *C.J.S.*, *Master and Servant*, section 578, p. 350; *Banks* v. *Liverman*, 129 F.Supp. 743, 747 (E.D.Va., 1955), affirmed, 226 F.(2d) 524 (4 Cir., 1955).

equipment, we do not reach that point. There was certainly no duty on the part of the master to warn a certificated tankerman as to the use of approved flashlights in discharging the cargo aboard this particular barge.

While the individual liability of Smith and Marshall may appear to be academic in a case such as this—as presumably no individual could respond to the damages sustained—the matter may be of importance as and when the judgments are paid. Since Smith was admittedly in direct control over the discharge operations aboard the Barge, his personal liability is fixed. Marshall is exonerated for the reasons stated herein, although this would probably not be true if the conclusion had been reached that the open pilot light in the galley proximately contributed to the losses as Marshall must assume the responsibility for mooring the Tug to the Barge.

THE TREXLER CLAIM

Trexler, a crew member aboard the Tug, was born September 30, 1931. He was, therefore, approximately three months short of being thirty (30) years of age at the time of the tragic events giving rise to his death four days[27] after the fire. He was survived by his wife (born August 13, 1933), and three children, Robert (born May 17, 1957), Robin (born July 4, 1958), and Debbie (born September 6, 1960). At age 29, Trexler had a life expectancy of 42.16 years under the Commissioner's Standard Mortality Tables of 1958.

The claimant suggests varying factors in determining damages to be awarded under the Jones Act, including (1) notice of the increased cost of living necessitat-

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(27) Trexler expired on July 9, 1961, at 1:50 a.m.

ing higher awards,[28] (2) prospects of advancement,[29] (3) prejudgment interest,[30] (4) loss of nurture, guidance and training as to children,[31] (5) pain and suffering prior to death,[32] and (6) the extent of the dependency of the widow and children; i.e., their "pecuniary loss." Agreeing that all of these factors are proper items for consideration, it is now well settled that there cannot be mathematical precision in all cases. *Whitaker* v. *Blidberg Rothchild Company*, 296 F.(2d) 554 (4 Cir., 1961); *Gardner* v. *National Bulk Carriers, Inc.*, 333 F.(2d) 676 (4 Cir., 1964).

Counsel for the Tug and Barge, as well as for the owners and charterer contest the life expectancy of 42.16 years by stating that the Life Insurance Underwriters did not adopt, to any appreciable extent, the Commissioner's Standard Mortality Tables of 1958 until 1962, and that the tables in general use at the time of Trexler's death showed a life expectancy for a white male, age 29, to be 38.61 years. We believe that this is a distinction without a difference.[33] Bearing in mind that Trexler was very nearly 30 at the time of his death, we

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(28) *Browne* v. *Great Lakes Transit Corp.*, 5 F.(2d) 58, 60 (2 Cir., 1925); *Virginian Rwy. Co.* v. *Rose*, 267 F.(2d) 312, 316 (4 Cir., 1959).

(29) *Briscoe* v. *United States*, 65 F.(2d) 404, 406 (2 Cir., 1933).

(30) *Gardner* v. *National Bulk Carriers, Inc.*, 221 F.Supp. 243, 247 (E.D. Va., 1963), affirmed, 333 F.(2d) 676, 677 (4 Cir., 1964).

(31) *Gardner*, supra; *Michigan C. R. Co.* v. *Vreeland*, 227 U.S. 59, 71.

(32) *St. Louis & Iron Mtn. Ry* v. *Craft*, 237 U.S. 648 (1915); *Hutchison* v. *Pacific-Atlantic Steamship Co.*, 217 F.(2d) 384, 386 (9 Cir., 1954).

(33) Counsel for the owners of the Tug and Barge argue that, in any event, there should be a credit of $6,000 occasioned by the proceeds of a life insurance policy on Trexler's life, the premiums on which were paid by Vermillion Towing. They cite *O'Connor* v. *United States*, 269 F.(2d) 578, 585 (2 Cir., 1959), where the same question was discussed but not decided. In the opinion of this Court, the insurance policy was clearly a collateral source benefit which could never be the subject of a credit in a Jones Act recovery. Moreover, if allowed, would it be credited to all parties against whom judgment is to be entered?

establish his life expectancy at 42 years. We do agree that, in the use of such figures, his *working* life expectancy is more realistic at 36 years as, in modern days, retirement is considered normal at 65. Of course, even after retirement the average person generally has some benefits.

Counsel for Trexler makes a claim for wages lost to the date of trial. This is not a personal injury case and such a contention must be disregarded. Indeed, if the pecuniary loss is determined according to life expectancy as of the date of death, such an allowance for wage loss between death and the date of trial would be duplicitous.

In *Gardner,* supra, this Court fixed a discount rate of 3½%. We see no need to modify same. While it is true that investors may obtain a greater rate of return on their money, the off-setting factor is inflation.

For the six months of 1961 prior to his death, Trexler had gross earnings of $2,235.50. During 1960, he earned only $3,057.26. If we are to double his six months' earnings for 1961 to establish an annual wage, it would be the equivalent of $4,471.00. His gross income for 1958 was $4,884.28, and for 1959 it was $4,360.09. Considering his age, some prospects for advancement, and the ever-changing wage scale, we believe that, over the period of his working life expectancy, he would have averaged $4,700.00 per annum, which takes into consideration that seamen rarely, if ever, are employed on a 12-month basis, although working on a tug is generally deemed to be more dependable and steady.

Before attempting to ascertain the pecuniary loss to the widow and children, it is first necessary to allocate and deduct Trexler's likely personal expenditures under

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the rule enunciated in *O'Connor* v. *United States,* 269 F.(2d) 578, 583 (2 Cir., 1959). See also: *Gardner* v. *National Bulk Carriers, Inc.,* supra.

The widow testified that at each pay period (every two weeks), she would either go to the office to secure the check (if Trexler was away) or that Trexler would bring the check home, following which it would be deposited in the bank. She stated that Trexler took from $5.00 to $10.00 for his personal use whenever he was paid, and the balance was used for living expenses for the entire family. This is all of the evidence on this subject. Obviously, when at home, other personal living expenses were properly allocable to Trexler's presence in the household of five. In *O'Connor,* supra, when the case reached the Court of Appeals for the Second Circuit the first time (251 F.(2d) 939), a more or less arbitrary allocation was made for the support of the widow and one son. In *Gardner,* supra, where there was a widow and two children, this Court adopted a one-sixth percentage of annual contribution as being for the husband. In this case, we have one more child than in *Gardner,* plus the factor that a seaman employed on a tug in local waters is likely to be at home more frequently than a seaman on foreign or coastwise voyages. With little to go on, we attribute one-fourth of Trexler's average earnings to his personal living expenses, such figure to include the small sums he received for personal use each payday. Thus, we arrive at the conclusion that the average annual contribution for the benefit of his wife and three children is $3,525. This is their average total annual "pecuniary loss."

Following the teachings of *Gardner,* and allocating 10% for each child (one son and two daughters), we find that the average annual "pecuniary loss" for each child is $352.50, or a total of $1,057.50 for the three

children. The remainder is allocable to the widow, said average "pecuniary loss" based on actual computation being $2,467.50. Bearing in mind that some benefits may reasonably accrue after retirement, and that some adjustment as to personal living expenses and "pecuniary loss" to the widow would be made after the children reach majority, this latter figure is fixed at $2,600.

The beneficiaries will receive their pecuniary loss in advance of what they would have received if Trexler had lived.[34] Computed for a period of 36 years, the widow would have received the total sum of $93,600. The discounted value computed at 3½% (20.290) amounts to $52,754.

Unlike *Gardner*, supra, this is an appropriate case for the award of damages for conscious pain and suffering prior to death. Dr. Haynes testified that Trexler was burned over 95% of his body surface area, the burns being predominantly third-degree. He described the injuries as producing "a marked amount of pain and suffering." Dr. Haynes realized that the injuries would result in death and, on July 9, 1961, at 1:50 a.m., Trexler expired. This was about four (4) full days from the time he sustained his burns. For a day or so following his admission to the hospital, Trexler was lucid but he later became irrational. Narcotics were used to mitigate the pain but it could not relieve it entirely and, in addition to the burns, Trexler was subjected to nausea, vomiting, thirst, etc.

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(34) Because this pecuniary loss must be discounted is a further reason why prejudgment interest should be allowed. This case has been pending for several years and the responsibility for the delay must rest with the judge. Nothing further need be said about the matter except to note that the Norfolk-Newport News Divisions of the Eastern District of Virginia held the unique distinction of having the heaviest caseload in the nation for many years and, until September 1, 1967, additional judicial assistance was not forthcoming.

The widow testified that Trexler was only able to mumble and could not carry on an intelligent conversation.[35] She attempted to describe his pain as best she could. Certain medical, hospital, and funeral expenses were likewise incurred.[36] For the conscious pain and suffering and miscellaneous expenses, the Court awards $17,500. This portion of the award is not subject to the discounted value, but is entitled to prejudgment interest. It will be divided as follows: The sum of $1,500 to each child and $13,000 to the widow. *Gillespie* v. *U. S. Steel Corp.*, 379 U.S. 149 (1964). This part of the action would not survive if the claim was under the Virginia Wrongful Death Act. Va. Code, section 8-628.1.

Agreeing with counsel for the Tug and Barge that the loss of a mother, under normal circumstances, is entitled to greater monetary consideration in determining a child's claim for nurture, guidance and training than would be applicable with respect to the loss of a father, the claim is nevertheless compensable. In *Gardner*, the sum of $200 per annum was allowed to each of the two children during their minority, subject to being discounted as noted above. However, that case involved a seaman who was away from home on foreign or coastwise

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(35) This is in marked conflict with the testimony of the other crew members, including Smith, who visited Trexler while in the hospital, and who purported to relate Trexler's version of what he saw when the fire broke out. The testimony was admitted for record purposes only as it was clearly objectionable. The visit to the hospital was apparently on July 8, which is referred to by Carter as being "the same day he died." We assume that they did not visit Trexler during the early morning hours of July 9. As Dr. Haynes testified that Trexler was irrational at that time the evidence, even though falling within the rule of a dying declaration, would not be entitled to any weight.

(36) Since Trexler died ashore, at a time when he was entitled to medical care and maintenance, his burial expenses are apparently allowable under the Shipowners' Liability Convention of 1936. Funeral expenses are not allowable under the Virginia Death by Wrongful Act statute, and it is doubtful where such item is recoverable under FELA.

voyages while following the sea. Trexler's occupation was not as demanding with respect to his absences from home. The Court awards $300 per year for each child, during their respective minorities, same to be discounted in the same manner as the pecuniary loss from decedent's earnings.

The issue involving prejudgment interest has now been resolved in this Circuit. *Gardner,* supra. Adopting the same reasoning set forth by this Court, and affirmed by the Court of Appeals, prejudgment interest at the rate of 3½% per annum will be allowed from July 9, 1961, until the date of the entry of the final decree, and at the rate of 6% per annum thereafter until paid. The rate fixed for prejudgment interest is in line with the reasoning set forth in footnote 5 of the opinion of the trial court in *Gardner* (221 F.Supp. 243, 248).

Recapitulating the maze of figures in accordance with the awards herein made, and making allowance for the present value of $1.00, we arrive at the following:

To Myrtle Lucille Goodman Trexler—
For conscious pain and suffering, medical, hospital and funeral expenses
The sum of $13,000.00, plus interest.

To Myrtle Lucille Goodman Trexler—
For pecuniary loss discounted for 36 years
The sum of $52,754.00, plus interest.

To Guardian of Robert L. Trexler—
For pecuniary loss and loss of nurture, guidance and training, discounted for 17 years
The sum of $8,254.78, plus interest.

To Guardian of Robert L. Trexler—
Percentage of allowance for conscious pain and suffering

The sum of $1,500.00, plus interest.

To Guardian of Robin L. Trexler—
For pecuniary loss and loss of nurture, guidance and training, discounted for 18 years
The sum of $8,606.48, plus interest.

To Guardian of Robin L. Trexler—
Percentage of allowance for conscious pain and suffering
The sum of $1,500.00, plus interest.

To Guardian of Debbie L. Trexler—
For pecuniary loss and loss of nurture, guidance and training, discounted for 20 years
The sum of $9,273.33, plus interest.

To Guardian of Debbie L. Trexler—
Percentage of allowance for conscious pain and suffering
The sum of $1,500.00, plus interest.

We come finally to the status of the Trexler claim against the parties determined to be at fault in this proceeding. Trexler's personal representative filed her action under the Jones Act as to the Tug RAVEN, *in rem*, Vermillion Towing, *in personam*, Barge 104, *in rem*, and L & &, Southern, William E. Law and Robert R. Vermillion, all *in personam*. She also sued Crown, *in personam*, under the Virginia Death by Wrongful Act statute. Having exonerated Crown, William E. Law and Robert R. Vermillion, her action as to these defendants will be dismissed. However, as to the Barge, *in rem*, Southern, and L & L, the personal representative protected herself by asking for the benefits of "any other

statutes of the United States or the State of Virginia and the General Admiralty Laws of the United States which are applicable to her causes of action herein stated." As this Court has found that Vermillion Towing was Trexler's employer, we agree with counsel for the Tug and Barge that Trexler's claim under the Jones Act rests solely against Vermillion Towing. As stated in *Cosmopolitan Co.* v. *McAllister*, 337 U.S. 783, 791 (1949):

> "We have no doubt that, under the Jones Act, only one person, firm or corporation can be sued as employer."

The maximum recovery under the Virginia Death by Wrongful Act statute was, at the time of Trexler's death, limited to $30,000. Since the claim of the personal representative under the Jones Act well exceeds this amount, we assume that she still wishes to rely upon the Jones Act and, in fact, this is the exclusive remedy for a deceased seaman. *Lindgren* v. *United States*, 281 U.S. 38 (1930); *Gillespie* v. *U. S. Steel Corp.*, supra. She cannot, of course, recover twice for the same death, even though there are other parties who may be held responsible. Smith was not sued by Trexler's administratrix. Under the Virginia Death Act, she would clearly be entitled to the maximum recovery against Southern, *in personam*, and the Barge, *in rem*, but she cannot recover in excess of that amount as to Southern, *in personam*, and the Barge, *in rem*. As indicated herein, L & L is not liable *in personam*, but does lose the value of the Barge as the same existed after the fire.

In summary, a judgment will be entered in favor of Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, deceased, against

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the Tug RAVEN, *in rem,* and Vermillion Towing Corporation, *in personam,* for the total sum of $96,388.59 together with interest thereon at the rate of 3½% per annum from July 9, 1961, to the date of the entry of the final decree, and at the rate of 6% per annum thereafter until paid. Judgments will likewise be entered in favor of Trexler's personal representative against the Barge 104, *in rem,* and Southern Transportation Company, Inc., *in personam,* in the sum of $30,000, plus interest as aforesaid, but the judgment order shall provide that the liability of the Barge 104, *in rem,* and the *in personam* liability of Southern Transportation Company, Inc. is joint and several with the judgment against the Tug RAVEN, *in rem,* and Vermillion Towing Corporation, *in personam,* only to the extent of the aforesaid $30,000, plus interest, and executions on these latter judgments will only be issued in the event that the judgment against Vermillion Towing Corporation is reversed on appeal or otherwise is not satisfied.

Questions involving the joint liability of a Jones Act employer and other negligent parties are complex. In *Billiot* v. *Sewart Seacraft, Inc.* 382 F.(2d) 662 (5 Cir., 1967), an action was brought by the personal representative of a deceased seaman who had been employed on a towboat owned by Seacraft, which towboat was being refueled from a barge belonging to McDermott. Tied to the barge was a ship also owned by McDermott. The decedent, according to the complaint, either "slipped and fell or was thrown" from either the barge or the towboat when the ship moved away from the barge, thus causing a slack line to become taut and striking the decedent. Liability of both Seacraft and McDermott was predicated upon the negligence of both, as well as the unseaworthiness of the barge and towboat. There was a further claim for conscious pain and suffering prior to death. While the action against Seacraft and

McDermott was pending in the federal court, the personal representative brought another action in the Louisiana state court naming Seacraft, McDermott, and other defendants. McDermott and the other state court defendants, except Seacraft, settled their cases with the plaintiff and obtained a general release. McDermott was then dropped as a party defendant in the federal court. Pursuing her action against Seacraft in the federal court, summary judgment was granted to the defendant on the basis of the settlement with McDermott. Relying primarily upon *Loffland Bros. Co.* v. *Huckabee*, 373 F.(2d) 528 (1967), the Court of Appeals for the Fifth Circuit reversed, holding that the amount of the settlement with McDermott would merely constitute a credit upon any recovery against Seacraft. Under this reasoning we perceive no reason why a judgment in the sum of $30,000 should not now be entered against Southern and the Barge 104, *in rem*. The Court may control the issuance of an execution on this judgment.

The doctrine enunciated in *Billiot* and *Loffland* permitting the injured party to pursue the full amount of damages has been approved in *Smith* v. *Noble Drilling Corp.*, 390 U.S. 143 (1968).

An interlocutory decree will likewise be entered with respect to the remaining claimants seeking recovery against the interests of Vermillion Towing Corporation, L & L Towing Corporation, Southern Transportation Company, Inc., and Richard S. Smith.

Counsel will arrange for the presentation of an appropriate decree consistent with this memorandum.

/s/WALTER E. HOFFMAN
United States District Judge

At Norfolk, Virginia
September 12, 1968

District Court Judgment Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Mrs. Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, deceased,	:	
Libelant,	:	
v.	:	Admiralty No. 8210
Tug RAVEN, et als, and Crown Central Petroleum Corporation,	:	
Respondents.	:	
In the matter of Petition of L & L Towing Corporation, et als, for exoneration from or limitation of liability.	:	Admiralty No. 8213
In the matter of Petition of Vermillion ing Corporation, et als, for exoneration from or limitation of liability.	:	Admiralty No. 8214
Crown Central Petroleum Corporation,	:	
Libelant,	:	
v.	:	Admiralty No. 8249
William W. Marshall and Richard S. Smith,	:	
Respondents.	:	

Margaret R. Cavedo, et als,	:	
	:	
Libelants,	:	
	:	
v.	:	
	:	
William W. Marshall and Richard S. Smith,	:	Admiralty No. 8268
Respondents and Impleading Petitioners,	:	
	:	
v.	:	
	:	
Crown Central Petroleum Corporation,	:	
	:	
Impleaded Respondent.	:	

INTERLOCUTORY AND FINAL DECREE

These consolidated cases having come on for trial on October 24, 1962, and subsequent dates and the Court having considered all matters of law and fact and having rendered its Memorandum Opinion dated September 12, 1968, now therefore it is ORDERED ADJUDGED AND DECREED as follows:

1. That the Court's Memorandum Opinion dated September 12, 1968, be and hereby is adopted as findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2. That there is no personal liability on William E. Law and Robert R. Vermillion and William W. Marshall individually and all claims against these parties be and hereby are DISMISSED WITH PREJUDICE.

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3. That there is no in personam liability on L & L Towing Corporation, beyond its interest in the Barge No. 104 which was surrendered in the limitation proceeding herein, and all in personam claims against this party be and hereby are DISMISSED WITH PREJUDICE.

4. That there is no liability on Crown Central Petroleum Corporation and all claims against this party be and hereby are DISMISSED WITH PREJUDICE.

5. That Vermillion Towing Corporation and Southern Transportation Company, Inc., are not entitled to recover the damages which they sustained in the fire and their claims be and hereby are DISMISSED WITH PREJUDICE.

6. That Vermillion Towing Corporation and Southern Transportation Company, Inc., are not entitled to exoneration from or limitation of liability and their Petitions for same be and hereby are denied.

7. That Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, Deceased, recover judgment from the Tug RAVEN, in rem, and Vermillion Towing Corporation, in personam, damages in the total sum of Ninety-Six Thousand Three Hundred and Eighty-Eight Dollars and Fifty-Nine Cents ($96,388.59) together with interest thereon at the rate of 3½% per annum from July 9, 1961, to the date of this Decree, and at the rate of 6% hereafter until paid, plus taxable costs, to be distributed in accordance with the Memorandum Opinion.

8. That Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, Deceased, recover judgment from the Barge No. 104, in rem, and Southern Transportation Company, Inc., in personam, damages in the amount of Thirty Thousand Dollars ($30,000.00) together with interest thereon at the rate of 3½% per annum from July 9, 1961, to the date of this Decree and at the rate of 6% hereafter until paid, plus taxable costs; conditioned, however, that the in rem liability of Barge No. 104 and the in personam liability of Southern Transportation Company, Inc., is joint and several, with the in rem liability of the Tug RAVEN and the in personam liability of Vermillion Towing Corporation to the extent of Thirty Thousand Dollars ($30,000.00) plus interest and execution against Barge No. 104 and Southern Transportation Company, Inc., hereunder will only be issued in the event that judgment against the Tug RAVEN and Vermillion Towing Corporation is reversed on Appeal or otherwise not satisfied, following such efforts as are approved by the Court.

9. That Crown Central Petroleum Corporation recover from the Tug RAVEN and Barge No. 104, in rem, and Vermillion Towing Corporation, Southern Transportation Company, Inc., and Richard S. Smith, in personam, the damages which it sustained as a result of the fire in an amount and with such interest, if any, as may be later determined, plus taxable costs.

10. That Virginia Electric & Power Company, J. B. Morris, William W. Clark and Hazel Franklin recover from the Tug RAVEN and Barge No. 104, in rem, and Vermillion Towing Corporation

and Southern Transportation Company, Inc., in personam, the damages which they sustained as a result of the fire, in an amount and with such interest, if any, as may be later determined, plus taxable costs.

11. That Margaret R. Cavedo, Mary A. Cavedo, John and Joyce Mae Fulton and Mr. and Mrs. Edward L. Butts, recover from the Tug RAVEN and Barge No. 104, in rem, and Vermillion Towing Corporation, Southern Transportation Company, Inc., and Richard S. Smith, in personam, the damages which they sustained as a result of the fire, in an amount and with such interest, if any, as may be later determined, plus taxable costs.

12. That if no Appeal is taken within thirty (30) days, or, upon return of the Mandate from the United States Court of Appeals, or upon final decree of the United States Supreme Court, whichever is last, this cause on that date be referred to William B. Eley, Esquire, as Special Master, for determination of damages, except as to Trexler.

As to all actions of the Court adverse to their interests, each party has duly noted its exceptions.

/s/WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
October 23rd, 1968

Seen:

/s/SIDNEY H. KELSEY
Sidney H. Kelsey
Counsel for Myrtle Lucille Goodman Trexler, Administratrix of the Estate of Robert W. Trexler, Deceased.

/s/R. M. HUGHES, III
Seawell, McCoy, Winston & Dalton
Counsel for Crown Central Petroleum Corporation

/s/WAVERLEY L. BERKLEY, III
Jett, Sykes & Berkley
Counsel for Southern Transportation Company, Inc., Vermillion Towing Corporation, L & L Towing Corporation, William E. Law, Robert R. Vermillion, William W. Marshall and Richard Smith

/s/ROBERT H. POWELL, III
Williams, Worrell, Kelly & Worthington
Counsel for Virginia Electric & Power Company

/s/GUILFORD D. WARE
Crenshaw, Ware and Johnson
Counsel for Margaret R. Cavedo, Mary A. Cavedo, John and Joyce Mae Fulton and Mr. and Mrs. Edward L. Butts

/s/CHARLES F. TUCKER
Vandeventer, Black, Meredith & Martin
Counsel for J. B. Morris and William W. Clark

/s/BURT M. MOREWITZ
Burt M. Morewitz
Counsel for Hazel Franklin

Order of January 22, 1970

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,216

Tug Raven and Vermillion Towing Corporation,

Appellants,

versus

Mrs. Myrtle Lucille Goodman Trexler,
Administratrix of the Estate of
Robert W. Trexler, deceased, Crown
Central Petroleum Corporation, et al.,

Appellees.

No. 13,217

Barge No. 104 and Southern Transportation Co., Inc.,

Appellants,

versus

Mrs. Myrtle Lucille Goodman Trexler,
Administratrix of the Estate of
Robert W. Trexler, deceased, Crown
Central Petroleum Corporation, et al.,

Appellees.

No. 13,218

Richard S. Smith,

Appellant,

versus

Crown Central Petroleum Corporation, et al.,

Appellees.

No. 13,219

Margaret R. Cavedo, Mary A. Cavedo,
John and Joyce Mae Fulton, and
Mr. and Mrs. Edward L. Butts,

Appellants,

versus

Crown Central Petroleum Corporation, et al.,

Appellees.

No. 13,220

J. B. Morris and William H. Clark,

Appellants,

versus

Crown Central Petroleum Corporation, et al.,

Appellees.

ORDER DENYING REHEARING

The petition for rehearing, with a suggestion for rehearing en banc, and the answers thereto, having been read and considered, and no judge in active service having requested a vote on the suggestion for a rehearing en banc, it is, ORDERED, that:

1. Said petition for rehearing be, and it is hereby, denied.

2. The opinion heretofore filed in the case is modified by withdrawing pages 33 and 34, and substituting in lieu thereof new pages 33 to 37, attached hereto.

/s/CLEMENT F. HAYNSWORTH, JR.
Chief Judge

/s/HERBERT S. BOREMAN
United States Circuit Judge

/s/HARRISON L. WINTER
United States Circuit Judge

APPENDIX D

Fourth Circuit Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,216

Tug Raven and Vermillion Towing Corporation,
Appellants,

versus

Mrs. Myrtle Lucille Goodman Trexler,
Administratrix of the Estate of
Robert W. Trexler, deceased, Crown
Central Petroleum Corporation, et al.,
Appellees.

No. 13,217

Barge No. 104 and Southern Transportation Co., Inc.,
Appellants,

versus

Mrs. Myrtle Lucille Goodman Trexler,
Administratrix of the Estate of
Robert W. Trexler, deceased, Crown
Central Petroleum Corporation, et al.,
Appellees.

No. 13,218

Richard S. Smith,
Appellant,

versus

Crown Central Petroleum Corporation, et al.,
Appellees.

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No. 13,219

Margaret R. Cavedo, Mary A. Cavedo,
John and Joyce Mae Fulton, and
Mr. and Mrs. Edward L. Butts,

Appellants,

versus

Crown Central Petroleum Corporation, et al.,

Appellees.

No. 13,220

J. B. Morris and William H. Clark,

Appellants,

versus

Crown Central Petroleum Corporation, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk
Walter E. Hoffman, Chief Judge

(Argued June 13, 1969 Decided October 31, 1969)

Before HAYNSWORTH, Chief Judge, BOREMAN and WINTER, Circuit Judges.

Waverly L. Berkley, III, and Eli Ellis (R. Arthur Jett; Jett, Sykes & Berkley, and Hill, Betts, Yamaoka, Freehill & Longcope, on brief) for Appellants; Robert M. Hughes, III, and Harry E. McCoy for Appellee Crown Central Petroleum Corporation, and Sidney H. Kelsey (Kelsey & Owens, on brief) for Appellee Trexler.

WINTER, Circuit Judge:

These appeals flow from the extensive litigation which resulted from an holocaust on the James River and adjacent shore facilities in the City of Richmond. In the early morning hours of July 5, 1961, Tank Barge No. 104, with the Tug RAVEN alongside, was moored at the dock of Crown Central Petroleum Company ("Crown"), discharging gasoline into Crown's storage tanks ashore. A fire erupted which brought about the death of a crew member of the tug—Robert W. Trexler. The tug and the barge were totally destroyed. Crown's dock and shoreside facilities were severely and extensively damaged. Nearby homes and other property were also damaged or destroyed.

William W. Marshall was the master of the tug. Richard S. Smith was a mate on the tug and also served as a licensed tankerman for the barge which was unmanned. The barge was owned by L & L Towing Corporation ("L & L") and, at the time of the fire, was operated under charter by Southern Transportation Company, Inc. ("Southern"). The tug RAVEN was owned and operated by Vermillion Towing Corporation ("Vermillion").

Myrtle L. G. Trexler, the widow and administratrix of the deceased seaman, sued first, naming as defendants Crown, the tug and barge, Vermillion, L & L, Southern, and the stockholders and chief executive officers of L & L, Southern and Vermillion. The barge owner and charterer, the tug owner, and their chief executive officers and stockholders then instituted proceedings for exoneration from or limitation of liability. Crown filed claims in each proceeding. The tug owner and barge owner then counterclaimed against Crown, asserting that Crown was solely responsible for the wide-

spread damages which had been suffered. In this proceeding a number of individual property owners in the area of the Crown terminal intervened, claiming against the tug and the barge. They also impleaded Crown to claim recovery against it should Crown be held responsible. Trexler's administratrix also entered the proceeding, claiming against the vessel owners. The tug owner claimed for its hull loss in the barge owner's proceeding, and the barge owner claimed for its hull loss in the tug owner's proceeding.

Crown also filed suits against Marshall and Smith, and similar suits were also filed by several of the individual property owners.

All cases were consolidated for trial. Succinctly stated, the district court in its memorandum opinion concluded that the fire and resulting damages were attributable to the tug's mate Smith's negligent use of a Coast Guard unapproved flashlight during the discharging operations. The district court held the tug and barge liable *in rem*, the tug owner and barge charterer liable *in personam*, and denied to them the right of limitation. It also held Smith liable individually to those parties who had sued him. In the district court's view the barge's *in rem* liability arose from the fact that it was unseaworthy since it was not equipped with explosion-proof flashlights. The barge owner was exonerated, but the barge charterer was held liable *in personam*, because it failed to exercise due care to determine if Smith possessed an approved flashlight. The barge charterer was denied limitation because of its knowledge that the barge was not equipped with explosion-proof flashlights. Smith was determined to be the mutual employee of the tug owner and barge charterer and, hence, his negligence was attributable to both.

The tug owner was held liable because it had assumed the responsibility of furnishing proper flashlights and had only furnished one. Because the tug owner had privity and knowledge of the negligence and unseaworthiness of the barge, the district court denied it the right of limitation.

Crown was exonerated and awarded judgment against the tug, barge, tug owner, barge charterer and Smith. The individual property owners also obtained judgment against this group. The damages resulting from Trexler's death were assessed in the amount of $96,388.59 plus interest, and judgment entered against the tug owner under the Jones Act. The barge charterer was also held liable to Trexler under the Virginia Death by Wrongful Act statute, in the amount of $30,000.00. Execution was allowed, however, only in the event that this Court reversed the district court and exonerated the tug, or if the tug owner did not satisfy the full award made under the Jones Act.

The barge, tug, barge charterer, tug owner and Smith have appealed. We conclude that the finding of the district judge that the catastrophe was precipitated by Smith's use of an unapproved flashlight was clearly erroneous. We conclude that on this record Crown was solely responsible for the tragic events, and that it is liable to Trexler's estate, the barge owner, the tug owner, and the various owners of property which was damaged or destroyed. We remand the case for the entry of a decree in conformity with our views and further proceedings to terminate the litigation.

- I -

We must first state the general circumstances of what transpired in order to place our analysis of the

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district court's findings and our own conclusions in the proper context.

At the time of the fire the barge was moored to the terminal dock, about 110 feet from the storage tanks which were located well up a hillside. Houses were behind the tanks on the other side of a public street. The barge was moored roughly parallel to the shoreline with its aft end north. The tug was moored outboard at the bow end of the barge and facing in the opposite direction. At the time the fire started, the barge was discharging gasoline from its aft tanks (No. 4) into Crown's shoreside tank No. 19.

The barge was a steel tank barge 194.7 feet long and 39.4 feet wide, having eight cargo compartments, four each on the port and starboard sides. At the aft deck of the barge was a pump with a capacity of 1,100-1,200 gallons per minute (66,000-72,000 gallons per hour) at 350 RPM's. The barge had been previously owned by Crown and sold to the barge owner about three months before the fire. At that time it had been equipped with a pump having a pumping capacity of 35,000 gallons per hour.

The tug, 54.4 feet long and constructed of wood, was arranged with a raised pilot house forward, followed by a cabin with four berths, engine room and galley at the after end of the house. In addition to Marshall (captain) and Smith (mate), the tug's crew was composed of Grady Carter (cook) and Robert Trexler (deckhand).

The Crown terminal was in charge of Clarence C. Price, a watchman. Price notified Clinton B. Chadwick, Crown's assistant plant supervisor, of the barge's arrival, and Chadwick came to the terminal to attend to the discharge of the barge. Seventeen days after the catastro-

phe, Chadwick committed suicide, and the only statement of his observations and his part in the events leading up to the fire was the testimony which he gave at a Coast Guard investigation shortly after the fire occurred.

The barge was loaded at Norfolk on July 3-4, 1961, with gasoline to be delivered to Crown and others, and each of the two No. 4 tanks contained 52,777 gallons of gasoline. The discharge to Crown began at approximately 12:15 A.M. on July 5, 1961. The barge's cargo hose was connected to the Crown manifold on the dock by the tug crew and checked by Chadwick prior to the commencement of the pumping operation. Leads from this manifold were controlled by valves and connected by pipes to the Crown shore tanks.

It was intended to pump gasoline into Crown's tanks Nos. 18 and 19. At the beginning of discharge, tank No. 18 could accommodate 56,498 gallons, and tank No. 19, 61,887 gallons. After the fire the valves on tank No. 19 were found to be open and the valves on tank No. 18 closed.

There was evidence that the discharge was carried on at a rate of 66,000 gallons per hour. It continued without interruption or difficulty for approximately one hour until the pumping was shut down by Tankerman Smith upon his becoming aware of the fire. According to Smith, he had been engaged in checking the No. 4 tank on the stern of the barge. The check of the tank was made by using an ordinary metal cased Coast Guard unapproved flashlight. Smith had previously found that the two Coast Guard approved flashlights to which he had access were inoperative, and he had dropped and broken a third unapproved flashlight which he had borrowed from Chadwick. While checking the

tank, he heard a shout behind him, turned and saw fire at the forward end of the barge. Smith cut the engine, disengaged the pump, went overboard, swam to the middle of the river, then turned back and swam into the barge and around it onto the Crown terminal shore under the stern of the barge. Although he was covered by soot, Smith was uninjured and suffered neither burns to his person or clothing nor singeing of his hair, eyebrows or eyelashes.

Marshall, Carter and Trexler were in their bunks in the tug cabin immediately before the fire and were alarmed by the extremely pronounced odor of gasoline fumes. They described these fumes as much stronger than those normally encountered during the discharge of a barge. The three men arose from their bunks and started out of the cabin to investigate. Trexler was in the lead, followed by Carter and Marshall. Trexler went through the door and stepped over onto the barge deck. As Carter was about to step out of the tug cabin, he looked to his right, i.e., towards the bow of the barge, and saw fire coming from under the forward end of the barge and along the deck of the tug. Carter called to Trexler to return, but Trexler did not do so and continued on across the barge. Carter and Marshall went through the cabin, out onto the port side of the tug and into the water, swimming over to the other bank. As Carter and Marshall were swimming across the river they observed fire all around the stern of the tug and up the hill to the tanks. Carter and Marshall suffered no injuries or any burns to their persons or clothing. Trexler apparently made his way across the barge, onto the dock and partly up the hill of the tank farm. His clothing was almost entirely consumed by the fire, and 95% of the surface of his body was severely burned.

He was taken to the hospital where he died a few days later.

A fire alarm was received by the Richmond Fire Department about 1:32 A.M. on July 5, 1961. After the fire department arrived and began to fight the fire, tank No. 19 exploded. The fire extended across East Main Street, in the City of Richmond, and caused considerable damage to and destruction of a number of residences.

- II -

The district judge found that the sole proximate cause of the fire was Smith's use of the unapproved flashlight. Upon this finding he rested his determination of liability as between the Trexler estate, the barge, the tug, Crown and the property owners, and his resolution of the subsidiary questions of the entitlement of the barge and the tug to limitation of liability and recovery from Crown. We reject this finding.

The tug was apparently equipped with two Coast Guard approved flashlights. Both were inoperative at the time that the tug and the barge docked at the Crown facility and the discharge began. Smith, whose duties included general charge of the discharge operations of the tug and barge, borrowed an unapproved flashlight from Chadwick when he found the two approved flashlights would not work. After a few minutes, however, Smith dropped and broke the borrowed flashlight. He then went aboard the tug and obtained another unapproved flashlight from the engine room, and when the fire broke out he was using it to check the contents of the barge's No. 4 stern tank from which gasoline was being pumped. If Smith's testimony is to be believed, Smith was leaning down into the No. 4 tank manhole opening with his flashlight when the catastrophe began.

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The finding of the district judge was predicated upon his rejection of Smith's testimony and that of Marshall and Carter who corroborated him, and his acceptance of the testimony of Chadwick and the Crown night watchman Price. The finding was also based on evidence that after the fire the flashlight was found on the deck a few feet from the No. 4 tank manhole and that a fire extinguisher which had been mounted near the opening to the No. 4 starboard tank was also found on the deck, it obviously having been removed from the bracket on which it was held. In the record was the opinion of one expert, contradicted by other experts, that Smith's use of the flashlight caused the fire, although the district judge did not appear to have placed much reliance on that opinion. An experiment was conducted during trial, which Crown argues showed how Smith could have started the fire without burning or singeing himself.

At the Coast Guard hearing Chadwick testified that after the discharge operation had begun he went to Crown's office at the northern end of the tank farm, and that when he later came out of the office everything was "quiet, serene, peaceful" on the barge. As he looked in the direction of the barge, suddenly there was fire on the barge, and the fire spread rapidly, arcing with several big flashups. Chadwick was specific that when he first saw the fire it was only on the barge and, specifically, on the "back portion of the barge which was toward me."

Price, the night watchman, was in the office with Chadwick. He testified that he and Chadwick "jumped" out of the office because they heard someone holler—not, as Chadwick had testified, that Chadwick left the office in the ordinary course of events. Price continued that when they got out of the office they saw a blaze on the

barge 3 to 4 feet high around the whole stern. The fire was somewhere around the center of the barge on the stern. As he and Chadwick ran to the barge, there was an explosion and the fire spread all over the stern and the dock. As they approached the dock Trexler came over it screaming that he knew that he was going to die. The fire arced to the vent of tank No. 18 which exploded. There had been no fire on the ground until tank No. 18 exploded. All told, there were two explosions on the barge and two on the tanks. On cross-examination, it was shown that Price had previously testified during a discovery deposition that the tug was tied to the starboard side of the barge "down around the stern of it some place." In fact, the tug was tied at the bow end of the barge.

The testimony of Chadwick and Price is mutually contradictory as to how Chadwick and Price happened to observe the fire for the first time. In addition, from Price's apparent confusion as to the location of the tug vis-a-vis the barge it could be inferred that when he testified that he first saw the fire at the stern of the barge he may have meant the bow. In any event, their testimony is more sharply contradicted by that of Smith, Carter and Marshall.

Smith testified that when he was looking down into the No. 4 starboard tank, located at the stern of the barge, he heard someone holler and turned around. He then looked south, i.e., to the bow of the barge, and saw Trexler between the No. 1 tanks and the bow of the tug. Smith saw fire behind Trexler, and Trexler was also on fire.

Carter and Marshall testified that Trexler and they had been conversing while lying in their bunks in the cabin of the tug. The abnormally strong odor of gaso-

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line fumes caused them to arise to investigate. Carter testified that Trexler emerged from the starboardside first and that he, Carter, was so close behind Trexler that he had to catch the screen door to keep it from slamming. As Carter emerged he looked to the stern end of the tug, which was also the direction of the bow of the barge, and saw fire "like a cone twisting, coming from the end." He stepped back into the cabin, slammed the door, hollered "run to the other side of the boat" and jumped overboard. Carter was specific that there was no fire coming from the galley of the tug, but that the fire was on the deck of the barge. He did not know whether the fire came from the rake of the barge or not. He also remembered hollering to Trexler to tell him there was fire. As he closed the door to the cabin the fire came between him and Trexler.

Marshall testified that as Carter began to step on the deck of the tug, flames came past the door. Marshall called to Trexler to come back and to Carter to go overboard. Marshall and Carter both dove into the river from the port side of the tug. Marshall came up from his dive about 15 feet from the tug and he could see that everything on Crown's hill was on fire and that there was burning fluid around the stern of the tug and the bow of the barge.

When the flashlight was picked up after the fire there remained a light mark on the dock immediately under it. From this fact the district judge inferred that the flashlight had been in this position during the fire. From the additional fact that the fire extinguisher was found on the deck of the barge after the fire, near the bracket in which it usually rested, the district judge concluded that Smtih, in spite of his testimony to the contrary, had attempted to use the fire extinguisher to put

out the fire since the district judge believed that Smith was the only person who could have had access to the extinguisher. From this inference, the district judge drew the further inference that the fire must have begun where Smith was working, else Smith "would not have even thought of the fire extinguisher in his haste to leave the barge."

The evidence which we have recited leads us to reject as "clearly erroneous" the district court's finding that the fire was started by Smith's use of the unapproved flashlight. In reaching this conclusion we are not unmindful of the fact that the district judge had an opportunity to observe Smith testify and to judge his credibility. Nor do we ignore the fact that Smith was neither an accomplished nor an overly intelligent witness. He contradicted himself in several respects, and he departed from testimony which he had given in a discovery deposition. At the same time, however, at many of the critical points his testimony was corroborated by that of Carter and Marshall, witnesses concerning whose credibility the district judge made no adverse comments. Furthermore, in deciding this case, the district judge placed heavy reliance on the testimony of Chadwick, who never appeared before him and whose testimony is gravely suspect for reasons which will shortly appear. While Rule 52(a), *Fed. R. Civ. Pro.*, expressly provides that findings of fact shall not be set aside unless "clearly erroneous," and due regard shall be given to the district judge's opportunity to judge the witnesses' credibility, we are nevertheless left with "the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)), when the entire record is closely analyzed and proper weight given to the testimony of Chadwick.

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Chadwick's testimony was presented by use of a portion of the proceedings before the Coast Guard in its investigation of the catastrophe. In those proceedings Chadwick was sworn. There was a presiding officer who conducted the proceedings, ruled on the form of questions and ruled on the admissibility of evidence. The object of the inquiry was to fix responsibility for the fire—the object of these proceedings. Full cross-examination on the facts as then known by counsel for the Trexler estate, counsel for Crown and counsel for the barge and tug was permitted. The interests of those present and represented by counsel were substantially the same as those who are parties in these proceedings, but who did not appear in the Coast Guard proceedings. It is true that Chadwick's cross-examination was carried on before his gauging records and the barge loading records were produced, and that these could have served as a basis for more pointed and specific cross-examination, but the transcript of the Coast Guard proceedings does not disclose that there was any understanding on the record that Chadwick would be subject to further examination when those records were in hand, and Chadwick was advised by the investigating officer only generally "[y]ou are subject to recall." Correctly, we think, Chadwick's testimony was admitted at trial. *Insul-Wool Insulation Corp.* v. *Home Insulation, Inc.*, 176 F.2d 502, 503-04 (10 Cir. 1949); *Hertz* v. *Graham*, 23 F.R.D. 17 (S.D. N.Y. 1958); McCormick, *Law of Evidence*, §§ 231-33 (1954); 5 Wigmore, *Evidence*, §§ 1386-88 (3d Ed. 1940).

Although admissible, Chadwick's testimony is entitled to little weight. His testimony was given nine days after the fire and, although all counsel had full opportunity to cross-examine him in the Coast Guard proceeding, it can hardly be supposed that in a catastrophe of

this magnitude all of the pertinent facts and issues were then discernible. More importantly, eight days later, on the day after Crown's barge loading records and Chadwick's gauging records were furnished to the Coast Guard, Chadwick committed suicide. The record does not show his motive for self-destruction, but, concededly, Chadwick was in charge of the discharging operation and he knew that Trexler had lost his life. While no criminal charges had been lodged, Chadwick must have known that his part in the disaster was one of the subjects of official investigation, if indeed the finger of suspicion was not pointed to him. Under generally accepted rules of evidence flight after the commission of a criminal act constitutes circumstantial evidence of consciousness of guilt and suicide is a form of flight. 2 Wigmore, *supra*, § 276; McCormick *supra*, § 248. Chadwick's suicide, therefore, was circumstantial proof of a guilty conscience. It must be deemed a weighty factor in diminishing the credibility of Chadwick's exculpatory testimony.

Thus, when we consider the evidence which we have summarized in the light of the relatively little weight to be given to Chadwick's testimony, we can only conclude that the finding that Smith's use of an unapproved flashlight caused the fire cannot stand. Smith himself denied the fact. There was corroboration from Carter and Marshall. There was physical corroboration from the fact that Smith was neither burned nor singed. The record suggests strongly that burning or singeing of Smith would be avoided only if he dropped the flashlight into an area of inflammable vapor in which he was *not* standing or if he threw it. From the testimony of the rapadity with which the barge was enveloped in fire, we do not think that the former was possible. Certainly, there is no reason to believe the latter. Like the district

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judge, we are not impressed with the courtroom demonstration on a micro-scale and under controlled circumstances. A close reading of the testimony of the expert whose opinion was that Smith started the fire shows that he adopted this thesis only because he accepted the accuracy of Chadwick's testimony that the fire started where Smith was standing. His opinion turns on the testimony of Chadwick.

Chadwich's testimony that the fire began at the stern of the barge was weak in itself, as we have stated, and may be explained by the testimony of his coworker Price. Price testified that he and Chadwick did not leave the office until after hollering was heard. The hollering must have been that of Trexler because the fire had begun. Once begun, it spread rapidly, according to Carter and Marshall, from the bow to the stern of the barge. Thus, Chadwick's first observation of fire at the stern of the barge would not necessarily prove that that was where the fire started. Nowhere in his testimony was Smith asked what he did with the flashlight which he said was in hand at the time that he, too, heard Trexler hollering. Its presence after the fire on the deck of the barge near the manhole seems to us to prove nothing, except to negate the suggestion that Smith threw it or dropped it into an area of inflammable vapor in which he was not standing. Nor do we find persuasive the fact that the fire extinguisher was discovered on the deck, removed from its holder. This also seems to us to establish very little. In addition, Smith was not the only person who had access to the fire extinguisher. Trexler was trapped on the deck of the barge with the fire around him, and he may have attempted unsuccessfully to use the fire extinguisher to create a path through the flames.

On the record before us the source of ignition of the fire cannot be determined. As unsatisfactory a witness as Smith may have been to the district judge, Chadwick's testimony simply cannot overcome Smith's corroborated testimony and be relied upon to place the fault on the barge or tug on the basis of Smith's acts. There is, thus, an insufficient basis to support a finding that the proximate cause of the fire lay in Smith's use of the unapproved flashlight, or even that his use of the flashlight was a contributing cause of the fire, and the only direct evidence on the subject negatives the possibility that the stove light in the tug's galley was where the fire began. We, therefore, see no basis on which to impose liability on the tug or the barge, or to deny them recovery from the party who can be determined was at fault.

- III -

Fire results from the concurrence of fuel, oxygen and ignition. In a fire like the one with which we are here concerned, it is axiomatic that oxygen is present in abundant supply in the atmosphere, so that sufficient oxygen to make a combustible mixture of oxygen and gasoline may occur without fault as to the source of oxygen. Ignition might well have occurred without fault on the part of the barge, tug, or any other person, i. e., from static electricity, a nail in the shoe of someone striking a steel object, the striking of the steel barge against a metal fixture on the dock, etc. Of direct concern, therefore, is what the record establishes with regard to the availability of fuel. We read the record to establish that Crown, in dereliction of its duty, permitted an unreasonable and dangerous accumulation of gasoline vapors to collect so that when ignition without fault occurred, the holocaust ensued. That the vapors were present and collected is beyond dispute. On the record

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we may speculate that they resulted from an overflow of Crown's No. 19 tank, but such a finding is not necessary to impose liability on Crown.

In the ordinary course of the discharge operation which was being carried on, gasoline vapors would be released into the atmosphere. These vapors would emanate principally from the three-inch vent atop the Crown No. 19 tank which was being filled because the gasoline entering this tank would force out the vapors previously contained. To a lesser extent, vapors would also come from a similar vent atop No. 18 tank. The manholes on the port and starboard tanks Nos. 1 and 4 on the barge were open, but only a negligible quantity of vapors would emanate from them because the No. 1 tanks had fire screens over their tops and gasoline was being pumped from the No. 4 tanks. The pumping operation would cause air to flow into the No. 4 tanks to replace the gasoline which was being removed. The displaced vapors from the Crown tanks Nos. 18 and 19 were disbursed into the atmosphere, but the evidence establishes that until a gallon of pure gasoline vapor is diluted with 70 times its volume of air, it will remain combustible and explosive.

Gasoline vapor and a mixture of gasoline vapor and atmosphere are heavier than pure atmosphere alone. In this case the Crown tanks were on a hillside and were higher than the river and the vessels moored at the dock. In addition, July 4-5 was a hot, humid night with little or no discernible movement of air. The terrain, weather conditions and physical properties of gasoline vapors thus combined to cause vapors emanating from Crown's tanks to go down the hill and to collect in the area in which the barge and tug were moored.

The record admits no finding other than that the

accumulation of vapors on the night in question was unusual and dangerous. The fact is that Marshall, Carter and Trexler, all of whom were experienced tankermen and all of whom were accustomed to the odor of petroleum products and not easily alarmed, were moved to investigate the abnormally strong odor of gasoline just before the fire erupted. In addition, numerous residents of East Main Street, who lived at points higher than Nos. 18 and 19 tanks and who had had experience with prior discharge operations, testified that the fumes were the "strongest" and the "heaviest" that they had ever experienced.

The description of how the fire developed, once it had begun, corroborates the conclusion that an abnormally heavy accumulation of combustible vapors collected and that they originated from Crown's tanks. The fire, once it began, raced uphill, a pattern which, according to expert testimony, would not have been followed unless there was an abnormal concentration of vapors in the area. Although the barge's tanks exploded early in the fire, various witnesses described the fire as "arcing" to the vents of Crown's tanks Nos. 18 and 19, and this phenomenon could not be attributed to the spewing of gasoline by the explosion of the barge's tanks. By the time Marshall and Carter had retreated into the river, surfaced and looked behind them, the whole hill was on fire. There can be no serious dispute that conditions were such that once ignition was supplied there was almost instantaneous conflagration.

At trial Crown's assistant operations manager for the eastern states testified that Chadwick was the Crown employee responsible for the unloading of the barge and safety of the operations. He stated unequivocally that the operation should have been discontinued if neces-

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sary to prevent an unsafe accumulation of gasoline vapors. This testimony recognized the duty, and the legal responsibility for its breach, discussed in *Petition of Sinclair Nav. Co.*, 27 F.2d 606 (S.D. N.Y. 1928). In that case fire occurred when the tanker Thompson was discharging gasoline to a barge. The probable source of fuel for the fire was a break in the discharge line causing gasoline to be pumped onto the deck of the Thompson. As a definition of the basis for the determination of liability, the following statement is particularly pertinent because in that case, as here, the precise source of ignition could not be determined:

> "No one can say where the highly inflammable and explosive vapors, formed upon exposure of all this gasoline to the air, may have come in contact with sufficient heat to ignite and explode. Some of the witnesses say they first observed the fire on the ship; others, that the first fire they saw was on the barge. But the question is of little importance, because, once the break in the hose line occurred, fire was but the natural and probable consequence of allowing such a quantity of gasoline, in contact with the open air, to flow on the deck and over the side of the ship. *One who allows highly inflammable and explosive gases to escape control, under circumstances which are almost certain to result in the destruction of life and property, can hardly escape liability because those who are injured in a resulting fire are unable to show with precision where and how the fire began. The proximate cause of the fire was the escape of the gasoline, and liability turns upon responsibility for the break in the discharge line, not upon*

the place where the escaping gasoline first caught fire." (emphasis supplied.) 27 F.2d at 607.

As in *Sinclair,* liability must be imposed on the party who allowed highly inflammable and explosive gases to escape under circumstances which resulted in death and widespread property destruction. That person, on this record, was Crown, and we hold Crown solely responsible.

The record provides a basis from which we can speculate that the abnormal and dangerous concentration of explosive and inflammable gasoline fumes resulted from an overflow of Crown's No 19 tank in addition to those escaping from the vents of its Nos. 18 and 19 tanks. The key to this theory of what transpired lies in the testimony of Chadwick.

Chadwick testified that he intended to place the total of 105,554 gallons of gasoline in the barge's No. 4 tanks into Crown's Nos. 18 and 19 tanks. Tank No. 18 could accommodate 56,498 gallons and tank No. 19, 61,887 gallons. Chadwick testified that after taank No. 18 was almost filled, he switched the intake of gasoline to No. 19 tank. His testimony in regard to switching stands alone. It is without corroboration, and, as indicated, his testimony is generally suspect. In addition, there is strong circumstantial evidence to controvert him in this vital regard

All of the witnesses agree that the pumping operation continued for approximately an hour before the fire erupted. In that period of time, the proof established that the barge's pump was capable of delivering 66,000-72,000 gallons—a quantity in excess of the unused capacity of either tank No. 18 or tank No. 19. The pump on the barge had recently been replaced with the effect

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of nearly doubling its pumping capacity. Chadwick was familiar with the barge, but he was apparently unaware that the new pump could deliver more than 35,000 gallons per hour. After the fire, the physical evidence established that tank No. 19 was being filled when the fire broke out. If Chadwick's testimony that he switched tanks during the pumping operation is not believed, manifestly, tank No. 19 could have been caused to overflow.

In addition to Chadwick's admission that he thought gasoline was being delivered at a much slower rate than was the fact, there was evidence that under the usual, normal procedure for switching the delivery from one tank to another, the services of *two* employees were required. These employees perform the operation known as "topping"—one examines the level of gasoline from the top of the tank being filled and at the appropriate time signals the other on the ground who then resets the valves at the manifold to direct the gasoline being pumped to another tank. Chadwick admitted that Smith had volunteered his services for "topping" when Chadwick was ready to switch tanks. Both Smith and Price—the only other person who would have assisted Chadwick in topping tank No. 18 had it been filled first—denied that Chadwick called on their help. Chadwick claimed that for some reason that he never explained he departed from the usual procedure on the night in question and switched the pumping from tank No. 18 to tank No. 19 without "topping" tank No. 18, and that he intended to "top" tank No. 18 at a later time. Even more significantly, Smith testified that he did not see Chadwick at the valves at the manifold after pumping had begun, as did Price, who was required to punch a time clock mounted near the area where Chadwick must have gone to make the shift if it ever occurred.

Other circumstantial evidence also casts doubt on the veracity of Chadwick's statement that he made the shift. Marshall and Carter, seconds after the fire broke out, obesrved the hill covered in flames. Trexler, who repeatedly stated his realization that he would die and whose testimony was probably admissible under *United Services Automobile Association* v. *Wharton*, 237 F. S. 255 (W.D. N.C. 1965), said, before his death, that gasoline was running down the hill and that he saw tanks overflowing.

The only corroboration that can be found for Chadwick's claim that he switched tanks was the testimony that initially the fire arced to the vents of the tanks and that until they exploded, fire was not observed within the catch basin at the base of either tank. From this it can be inferred that vapors from specific sources and not vapors from more general sources ignited in the first instance and that there was no initial overflow of raw gasoline. This inference may be overcome from the physical fact that raw gasoline does not burn—only the mixture of gasoline fumes and oxygen is combustible—and after the fire, a drainage pipe from the dike surrounding the base of both tanks was inexplicably found to be unplugged so that the dike could have drained as soon as gasoline flowed into it if it were open prior to the time that the fire began. Some corroboration for the theory that the drainage pipe was open and that it did carry off an overflow from a tank is found in the testimony of Marshall and Carter that when they were swimming in the river, they saw fire on the water around the barge.

However intriguing the failure-to-switch theory may be, we make no finding in this regard. We

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predicate our conclusion of Crown's liability solely on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred.

- IV -

The conclusions which we have reached require the exoneration of the barge, the tug, the barge charterer and tug owner. The judgments againt Smith should be reserved.

We turn next to the other specific judgments which the district court should enter. Although we have struck down the judgments which Mrs. Trexler obtained in the district court againt the barge, tug, barge charterer and tug owner, it does not follow that she should be left without any recovery or be remitted to a new trial. The judgment for $96,388.59 with interest which Mrs. Trexler obtained against the tug and the tug owner under the Jones Act was rendered, *inter alia*, on the finding that the deceased was employed by the tug owner. This judgment must be reversed. A like judgment cannot be entered against Crown, because there is no evidence that the deceased was an employee of Crown, and the law is settled that the Jones Act created new rights in injured seamen only against their employers. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783 (1949); *Continental Cas. Co.* v. *Thorden Line*, 186 F.2d 992 (4 Cir. 1951).

Mrs. Trexler also recovered a judgment under the Virginia Death by Wrongful Act statute, 2 Code of Virginia of 1950 §§8-633, *et seq.*, of $30,000.00 with interest against the barge and barge charterer. As to the barge and the barge charterer, this judg-

ment must be reversed because they, we have found, were without fault. But we think that a like judgment should be entered against Crown because (a) it was at fault, (b) the amount of the judgment was fully litigated and recovery in this amount (the maximum amount recoverable under the statute, 2 Code of Virginia of 1950 § 8-636 as amended by Ch. 387, Acts of 1958) was fully supported by the evidence, and (c) it is just and proper to hold Crown liable in this amount without another trial.

Crown's fault has hereinbefore been shown. On appeal no error has been claimed in the amounts of either judgment obtained by Mrs. Trexler. Our review of the record satisfies us that recovery in the maximum amount permitted by the Virginia statute was amply proved, and Crown participated fully in litigating the amount of damages.

Crown argues, however, that we lack jurisdiction to direct the entry of judgment against it because Mrs. Trexler failed to take a cross-appeal from the judgment adverse to her cause of action against Crown when the barge, tug, barge charterer, tug owner and Smith appealed. We disagree.

The judgment under the Virginia statute was obtained in the case (No. 13,216 in this Court) in which Mrs. Trexler sued Crown, the tug and barge, the barge owner and charterer, the tug owner and their chief executive officers and stockholders. Only the tug and the barge appealed, but the appeal by them unquestionably gave this Court jurisdiction over the case. Since Crown and Mrs. Trexler both appeared in this Court as appellees and participated fully in the appeal, we also have jurisdiction over

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the parties. While ordinarily an appellee—here Mrs. Trexler—cannot secure alteration or modification of a judgment unless he has taken his own appeal, this rule does not state a jurisdictional restriction on federal appellate courts but merely constitutes a "rule of practice." *Langnes* v. *Green,* 282 U. S. 531, 538 (1938); 9 Moore's, *Federal Practice,* ¶72.05 [4] at 3034-35.

We are persuaded that justice requires departure from this rule of practice in this case. Crown fully litigated the question of its liability and that of the tug and barge, the tug owner and barge charterer before us. It had fair notice and warning and a full opportunity, which was fully exercised, to respond to all of the arguments which could have been advanced by Mrs. Trexler had she taken an appeal. Stated otherwise, the tug, the barge and the other appellants advanced every argument that Mrs. Trexler could have advanced; Crown met all of the arguments; and, on the merits, we have decided against Crown. We accept the admonition of Professor Moore that the traditional federal "rule of practice" should not be permitted to subvert the "just" result which federal appellate courts are obliged to fashion under 28 U.S.C.A. § 2106, and we conclude that the "just" result is that we direct the district court to enter a judgment against Crown under the Virginia Death by Wrongful Act statute in like amount to that which the court granted against the appellants. 9 Moore's, *Federal Practice,* ¶72.05 [4] at 3035 and footnote 9.

As to all property claimants, including the barge and tug, an interlocutory judgment of liability against Crown should be entered and damages assessed promptly.

Crown should pay the cost of these appeals.

The judgments appealed from are reversed, and the case is remanded for further proceedings, in accordance with the directions contained herein.

REVERSED and REMANDED.

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gasoline. This inference may be overcome from the physical fact that raw gasoline does not burn—only the mixture of gasoline fumes and oxygen is combustible—and after the fire, a drainage pipe from the dike surrounding the base of both tanks was inexplicably found to be unplugged so that the dike could have drained as soon as gasoline flowed into it if it were open prior to the time that the fire began. Some corroboration for the theory that the drainage pipe was open and that it did carry off an overflow from a tank is found in the testimony of Marshall and Carter that when they were swimming in the river, they saw fire on the water around the barge.

However intriguing the failure-to-switch theory may be, we make no finding in this regard. We predicate our conclusion of Crown's liability solely on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred.

- IV -

The judgments below will be reversed. The barge and the tug should be exonerated, as should the barge charterer and tug owner. The judgment against Smith should be reversed.

On appeal no error is claimed in the amounts of the judgments obtained by the Trexler estate against the tug and the tug owner and the barge and barge charterer, respectively. We see no need to have the damages recoverable in the causes of action in which the judgments were entered retried. Judgment in like amount should be entered against Crown, but since the judgments duplicate to the extent of $30,000.00, Crown's

total liability should not exceed the larger of the two judgments.

As to all property claimants, including the barge and tug, an interlocutory judgment of liability against Crown should be entered and damages thereafter promptly assessed.

Crown should pay the cost of these appeals.

REVERSED, WITH DIRECTIONS.

28 United States Code §2107

§ 2107. Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104.

Excerpt From Trexler Estate Brief

V. CONCLUSION

We do not think that the factual findings of the District Judge are clearly erroneous nor are the District Court's conclusions of law erroneous. However, should this Court feel differently and hold that appellee Crown is also at fault or jointly at fault with the tug owner and barge charterer or should this Court feel that Crown is solely responsible for the fire and exonerate the tug owner and barge charterer, then we respectfully request that this Court further direct the Trexler judgment to be paid by those parties or party it may find responsible in this appeal. As we have previously pointed out, the decedent Trexler is an innocent party and one, some or all of the defendants are liable for the fire and for the Trexler damages.

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FEDERAL RULES OF CIVIL PROCEDURE

Rule 52.
FINDINGS BY THE COURT

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1438

Office-Supreme Court, U.S.
FILED
MAY 13 1970
JOHN F. DAVIS, CLERK

CROWN CENTRAL PETROLEUM CORPORATION,
Petitioner,

vs.

MYRTLE LUCILLE GOODMAN TREXLER,
Administratrix of the Estate of
ROBERT W. TREXLER, Deceased,
BARGE NO. 104, in rem,
L & L TOWING CORPORATION,
SOUTHERN TRANSPORTATION CO., INC.,
Tug RAVEN, in rem,
VERMILLION TOWING CORPORATION,
RICHARD S. SMITH,
WILLIAM E. LAW,
ROBERT R. VERMILLION,
WILLIAM W. MARSHALL,
Respondents.

ANSWER OF BARGE NO. 104, ET ALS, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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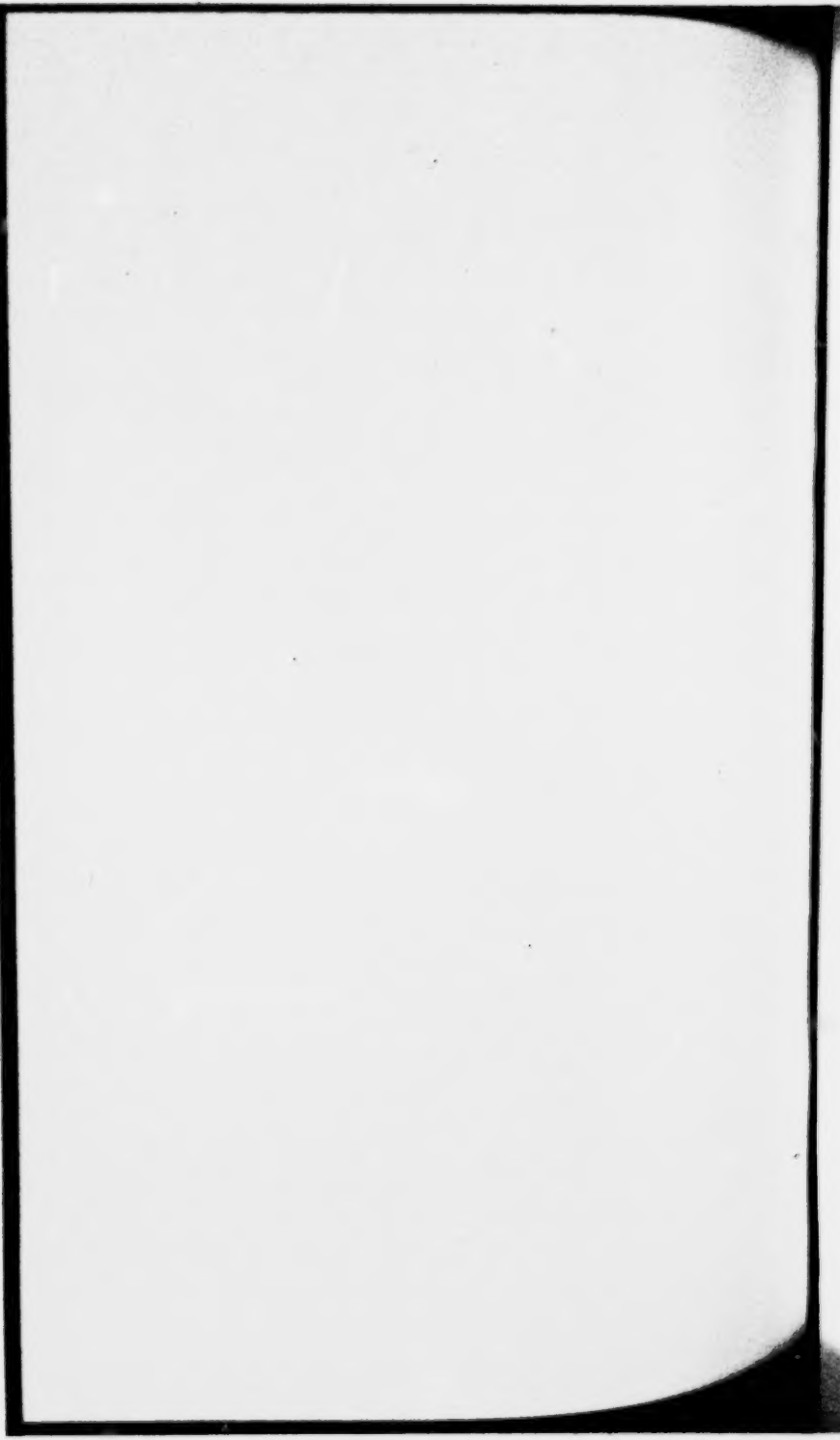

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ANSWER OF BARGE NO. 104, ET ALS, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Barge No. 104, in rem, L & L Towing Corporation, Southern Transportation Co., Inc., Tug RAVEN, in rem, Vermillion Towing Corporation,

Richard S. Smith, William E. Law, Robert R. Vermillion and William W. Marshall, respondents, respectfully request that this Court deny the petition of Crown Central Petroleum Corporation for issuance of a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in these consolidated matters on January 22, 1970.

THE QUESTION PRESENTED

In its petition for a rehearing filed with the Court of Appeals, petitioner raised the identical question it now presents to this Court, namely, whether the Appellate Court had jurisdiction to enter judgment for Trexler's Administratrix against petitioner when said Administratrix failed to formally note an appeal from the District Court's findings which exonerated petitioner. The United States Court of Appeals decided the issue against petitioner and in favor of Trexler's Administratrix citing its reasons therefor. The resolution of this issue did not then and does not now affect these respondents. In responding to petitioner's petition for a rehearing in the Court of Appeals, these respondents did not address themselves to that issue, and will not do so here because of their reluctance to take a partisan position on a question which does not concern them.

These respondents are constrained to advise the Court, however, that since these respondents had no control over the decision of Trexler's Administratrix not to appeal petitioner's exoneration by the District Court, it necessarily follows that they should not be prejudiced by the implications, if any, which flow from her failure to note an appeal.

Had petitioner limited comment in its petition to the specific question presented for consideration by this Court, neither the tug owner, barge charterer or Smith

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would have cause to reply, because this Court can grant or deny petitioner the relief it seeks from the recovery by Trexler's Administratrix without disturbing or affecting the opinion of the Court of Appeals as it applies to these respondents. However, while petitioner, in the question presented, does not contest the findings of the Court of Appeals holding it solely at fault for the fire and exonerating these respondents, under the heading of its reasons relied upon for the allowance of a writ, petitioner indirectly attacks these findings and goes beyond commenting on the question specifically presented. A brief reply is warranted.

STATEMENT OF THE CASE

This litigation was commenced when Trexler's Administratrix sued the Tug RAVEN, its owner, the Barge 104, its owner and charterer, the tug master and mate, the two presidents of the corporations owning the tug and barge, individually, and Crown Central Petroleum Corporation in the United States District Court. The tug and barge interests and petitioner cross-claimed against one another, and the tug and barge owners sought limitation of liability. The District Court exonerated petitioner, the tug master and the presidents of the two corporations owning the tug and barge and held the tug, its owner, the barge, its charterer, and the tug mate solely at fault for the fire. It awarded Trexler's Administratrix a Jones Act recovery against the tug owner who was held to be Trexler's employer, a relationship necessary in order to obtain a Jones Act judgment, and a recovery under the Virginia Death by Wrongful Act Statute against the barge charterer and the tug's mate, Smith. The recovery under the Virginia Death Act against the barge charterer and Smith were not in addition to the Jones Act recovery but were only to be enforced in the event the tug owner failed to sat-

isfy the Jones Act judgment in full. The tug, its owner, the barge, its owner and charterer and the tug's mate, Smith appealed. Trexler's Administratrix noted no appeal. Petitioner noted no cross appeal concerning the exoneration of the tug master, William W. Marshall, and/or the two corporate presidents, Robert R. Vermillion and William E. Law, who had been sued individually. Therefore, William E. Law, Robert R. Vermillion and William W. Marshall should not have been named as respondents by petitioner, as the matter is final as to them.

The United States Court of Appeals for the Fourth Circuit reversed the decision of the District Court and exonerated everyone but petitioner, whom it held solely at fault for the fire and Trexler's death. It allowed Trexler's Administratrix a recovery from petitioner under the Virginia Death by Wrongful Act Statute notwithstanding her failure to note an appeal of the District Court's exoneration of petitioner. Petitioner contends that the Appellate Court lacked jurisdiction to enter this judgment against it in favor of Trexler's Administratrix, and presents this question to The Court for review. While this specific question does not affect the rights of these respondents, they feel it incumbent upon them to correct several misleading comments in petitioner's statement of the case.

The implication of the first paragraph of petitioner's statement of the case is that Smith, the tug's mate, supervised the discharge of gasoline from the barge and Chadwick, Crown's terminal superintendent, supervised the loading of the shore tank. While Smith, a tankerman, did operate the barge pumps, Chadwick had complete overall responsibility for the entire unloading operation. The Court of Appeals recognized this fact in its opinion (Petitioner's Appendix D., page 70a):

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"At trial Crown's assistant operations manager for the eastern states testified that Chadwick was the Crown employee responsible for the unloading of the barge and safety of operations. He stated unequivocally that the operation should have been discontinued if necessary to prevent an unsafe accumulation of gasoline vapors . . .

As in *Sinclair,* liability must be imposed on the party who allowed highly inflammable and explosive gases to escape under circumstances which resulted in death and widespread property destruction. That person, on this record, was Crown, and we hold Crown solely responsible."

Petitioner in the third paragraph of its statement of the case on page 3 of the petition suggests that the District Court determined the cause of the fire by first determining the location of ignition and then the cause of ignition. It was precisely for this reason that the Court of Appeals found the District Judge clearly erroneous. The District Judge mistakenly correlated the source of ignition with the cause of the fire. He failed to explain the source of the vapors which were ignited.

The Court of Appeals for the Fourth Circuit adopted the law of *Petition of Sinclair Navigation Co.,* 27 F.2d 606 (S.D.N.Y., 1928) as the law of the Fourth Circuit. The fault must be placed, said the Court of Appeals, on the party allowing the gases to escape and accumulate in dangerous quantity. The opinion of the Court in the *Sinclair Case,* supra, is quoted extensively in the opinion of the Court of Appeals in the instant case (see Petitioner's Appendix D., pages 71a-72a).

The District Judge had the instant case under advisement for almost six years. The Court of Appeals, after a thorough review of the record, was in equally as

good a position to review the evidence as was the Trial Court. The Court of Appeals rejected the District Court's theory that the source of ignition was the sole cause of the fire. Its reasons are clear (Petitioner's Appendix D., page 68a):

> "On the record before us the source of ignition of the fire cannot be determined . . .
>
> Ignition might well have occurred without fault on the part of the barge, tug or any other person, i.e., from static electricity, or a nail in the shoe of someone striking a steel object, the striking of the steel barge against a metal fixture on the dock, etc. Of direct concern, therefore, is what the record establishes with regard to the availability of fuel. We read the record to establish that Crown, in dereliction of its duty, permitted an unreasonable and dangerous accumulation of gasoline vapors to collect so that when ignition without fault occurred, the holocaust ensued."

At the bottom of page 4 of its petition, petitioner implies that the Court of Appeals held the District Court "clearly erroneous" solely because the District Court rejected Smith's testimony. This is manifestly untrue as a mere reading of the Appellate Court's decision will evidence.

The Court of Appeals discussed in detail the testimony of both Smith and Chadwick and concluded that on the whole record they were "left with the definite and firm conviction that a mistake has been committed. (*United States* v. *United States Gypsum Co.*, 33 U.S. 364, 395)." (Petitioner's Appendix D., page 64a). There can be no dispute that this was a proper exercise of judicial discretion. More important, however, is the fact that the Court of Appeals did not hold petitioner at

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fault because of its acceptance or rejection of Smith's testimony or Chadwick's testimony. Petitioner was held solely responsible on the uncontroverted evidence that it allowed a dangerous accumulation of vapors in dereliction of its duty and this fact was affirmed by numerous independent witnesses. Said the Court of Appeals (Petitioner's Appendix D., page 74a-75a):

> "We predicate our conclusion of Crown's liability *solely* on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred." (Emphasis ours.)

REASONS RELIED ON FOR DENIAL OF WRIT

I. The Question Presented Does Not Place in Issue the Appellate Court's Exoneration of the Tug, Barge and Tug Mate, Smith, or the Fixing of Fault on Crown, and this Issue is not a Subsidiary Issue Fairly Comprised Within the Question Presented.

Rule 23(1)(c) of the United States Supreme Court required the petitioner to state the questions presented for review. The Rule further states that *only* the questions set forth in the petition *or fairly comprised therein*, will be considered by the Court.

Manifestly, the issue of the exoneration of the tug, barge and Smith and the issue of the fixing of sole fault on petitioner is not contained in the question presented as phrased by the petitioner. Neither can it really be said that these issues are fairly comprised within the question that is presented in the petition.

Notwithstanding its failure to present these questions directly, for obvious reasons, petitioner seeks entry through the back door by smokescreening its real com-

plaint with the Fourth Circuit, namely, the fixing of sole fault for the fire on petitioner. This Court should not be misled by these tactics.

As an example of what respondents mean, please note this quote from page 7 of petitioner's petition:

> ". . . the appellate court has not only revised the District Court's factual findings (i.e., as to the proximate cause of the fire, as to the place where the fire originally broke out and as to the cause of ignition) but also has revised the District Court's judgment, both revisions being in favor and for the benefit of Trexler's estate . . ."

The foregoing paragraph is hidden under the heading of Point I wherein petitioner claims that the Appellate Court's allowance of a recovery by Trexler's Administratrix against petitioner under the circumstances is in conflict with decisions of the Supreme Court of the United States. The above quoted paragraph is not related to the point to which it is addressed. It is actually a not so subtle attack upon the Court of Appeals' exoneration of the vessels and its fixing of responsibility on petitioner. Beyond this, the quoted paragraph is misleading.

The Court of Appeals certainly revised the District Court's conclusion as to the proximate cause of the fire, and rightfully so. It was, however, a conclusion and not a finding of fact. The Court of Appeals found the District Court clearly erroneous in finding Smith's flashlight as the source of ignition. Whatever the source of ignition, said the Appellate Court, (and on this record it cannot be pinpointed) the sole proximate cause of the fire was the large quantity of gasoline vapors which petitioner allowed to accumulate. Petitioner has consistently refused, by design or otherwise, to recognize this

and from the nature of its petition has attempted to keep this fact from this Court.

II. The Decision of the Court Below Does Not Conflict with this Court's Decisions in McAllister vs. United States, 348 U.S. 19, and Guzman vs. Pichirilo, 369 U.S. 698, and Does Not Constitute an Abuse of The Appellate Function.

This is in answer to Point IV of petitioner's reasons for allowance of a writ which begins at page 11 of the petition. Respondents offer this brief reply because the argument offered by petitioner under this point is not directed to the specific question presented to this Court for review, but is actually a broad assault on the Court of Appeals' entire opinion including its exoneration of the tug, barge and Smith and its fixing of sole fault on petitioner.

Petitioner's argument under this point is but a repetition of its argument filed with the Fourth Circuit which was rejected there and should be rejected here.

Respondents concur that the *de novo* concept of an admiralty appeal was laid to rest by this Court's opinion in *McAllister* v. *United States,* supra. Respondents further agree that findings of fact should not be set aside unless clearly erroneous and that due regard should be given to the trial court's opportunity to judge the credibility of the witnesses.

Respondents, however, do not deem the opinion of the Court of Appeals in the instant case to be the result of its considering the appeal as a trial *de novo.* The Court of Appeals, fully cognizant of the law as set forth in *McAllister* v. *United States,* supra, did not consider the case *de novo,* though in this instance, where

the District Court had the matter under advisement almost six years, the Court of Appeals was no doubt equally as capable of considering the record as was the Trial Judge and certainly, under the circumstances, little weight should be given the Trial Judge's opportunity to judge the credibility of witnesses. More especially is this so when he relied exclusively on the testimony of Chadwick, a witness he never saw, who testified only at a Coast Guard inquiry.

On page 12 of its petition petitioner cites seven "specific examples" in support of its allegation that the Court of Appeals conducted a trial *de novo*. Each of the seven alleged specific examples is easily refuted.

Petitioner alleges that the Court of Appeals was unable to cite any example where the District Court's analysis of the evidence was unsupported or uncorroborated. The fact is and the record confirms that Chadwick's testimony was unsupported and uncorroborated, even by his own fellow employee, Price.

Petitioner alleges that the Court of Appeals used as a basis for its decision evidence rejected by the District Judge for credibility reasons. This is patently untrue. The evidence that a dangerous accumulation of vapors existed and that the vapors came from petitioner's tanks was uncontroverted and it was the accumulation of these vapors which was the basis of the Fourth Circuit's decision.

Petitioner alleges that the Court of Appeals excused Smith's untruths, etc., on the grounds he was not an overly intelligent witness. Clearly this is not the case. The Court of Appeals admitted that Smith was not the most satisfactory witness, but observed that on the crucial issues of the case, Smith's testimony was corroborated

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by the testimony of others whose credibility the District Judge did not question. On the other hand, Chadwick's testimony was uncorroborated and even contradicted by his own fellow employee, Price.

Petitioner alleges that the Court of Appeals accepted and adopted Smith's testimony as the basis for new findings and conclusions. Whether because it fails to understand the Fourth Circuit's opinion or because it refuses to, petitioner ignores the fact that the basis of that court's opinion was that petitioner was responsible for a dangerous accumulation of fumes, the natural result of which was a fire, and that the source of ignition was not crucial in determining liability. In fact, the source of ignition could not be determined on this record according to the Court of Appeals.

Petitioner alleges that the Court of Appeals criticized Chadwick's testimony only because it was uncorroborated when in fact the Court's criticism went further than that. The Court said that Chadwick's testimony was not only uncorroborated, but in fact, contradicted by his fellow employee, Price, and subject to question because of Chadwick's subsequent suicide.

Petitioner alleges that the Fourth Circuit speculated that an overflow caused the fire. The Court's opinion clearly is not based on such a speculation. In commenting on the overflow theory caused by Chadwick's failure to switch valves, the Court of Appeals said: (Petitioner's Appendix D., pages 74a-75a)

> "However intriguing the failure-to-switch theory may be, *we make no finding in this regard.* We predicate our conclusion of Crown's liability *solely* on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred." (Emphasis ours.)

Finally, petitioner alleges that the Court concluded, without any evidence, that Chadwick's suicide was a form of flight. Actually, the Court merely commented that under the generally accepted rules of evidence, flight after the commission of a crime was evidence of guilt and that suicide was a form of flight. The Court said it had to give weight to the suicide in judging the credibility of Chadwick's testimony.

CONCLUSION

The petition raises no question affecting the rights or liabilities of the Tug RAVEN, its owner, Barge 104, its owner and charterer, Smith (the tug's mate) or William W. Marshall, William E. Law or Robert R. Vermillion. If the petition raises any question, it involves the rights of petitioner and Trexler's Administratrix and the granting of the writ should be limited to this issue. The judgment of the United States Court of Appeals as it affects these respondents should be affirmed.

For the foregoing reasons, these respondents pray that the writ of certiorari as to these respondents be denied.

Respectfully submitted,
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